Supreme Court, U.S.
FILED
FEB 8 - 2011
OFFICE OF THE CLERK

181

No. 10 1014

In The Supreme Court of the United States

COMMONWEALTH OF VIRGINIA,
ex rel. Kenneth T. Cuccinelli, II, in his
Official Capacity as Attorney General of Virginia,

Petitioner,

v.

KATHLEEN SEBELIUS,
Secretary of the Department of Health and
Human Services, in her Official Capacity,

Respondent.

On Petition For A Writ Of Certiorari Before Judgment To The United States Court Of Appeals For The Fourth Circuit

PETITION FOR A WRIT OF CERTIORARI BEFORE JUDGMENT

KENNETH T. CUCCINELLI, II
Attorney General of Virginia

E. DUNCAN GETCHELL, JR.
Solicitor General of Virginia
dgetchell@oag.state.va.us
Counsel of Record

STEPHEN R. MCCULLOUGH
Senior Appellate Counsel
smccullough@oag.state.va.us

CHARLES E. JAMES, JR.
Chief Deputy Attorney General

WESLEY G. RUSSELL, JR.
Deputy Attorney General
wrussell@oag.state.va.us

OFFICE OF THE
ATTORNEY GENERAL
900 East Main Street
Richmond, Virginia 23219
Telephone: (804) 786-2436
Facsimile: (804) 786-1991

Counsel for the
Commonwealth of Virginia

February 8, 2011

COCKLE LAW BRIEF PRINTING CO (800) 225-6964
OR CALL COLLECT (402) 342-2831

QUESTIONS PRESENTED

1. Whether the district court erred in holding that the Commonwealth has standing to challenge the minimum coverage provision (as stated by the Secretary).

2. Whether the district court erred in holding that the minimum coverage provision is not a valid exercise of Congress's Article I powers (as stated by the Secretary).

3. Whether the district court erred when it held that the unconstitutional mandate and penalty of the *Patient Protection and Affordable Care Act of 2010*, P.L. 111-148, 124 Stat. 119 (2010), as amended by the *Health Care and Education Reconciliation Act of 2010*, P.L. 111-152, 124 Stat. 1029 (2010), is severable from all the remaining provisions of the law.

4. Whether the district court erred when it denied injunctive relief.

CORPORATE DISCLOSURE STATEMENT

There are no disclosable entities, persons or interests.

TABLE OF CONTENTS

	Page
QUESTIONS PRESENTED	i
CORPORATE DISCLOSURE STATEMENT	ii
TABLE OF AUTHORITIES	vii
OPINION BELOW	1
JURISDICTION	1
CONSTITUTIONAL AND STATUTORY PROVISIONS	2
STATEMENT OF THE CASE	2
REASONS FOR GRANTING THE PETITION	13
A. This Case Is of Imperative National Importance Requiring Immediate Determination in this Court	13
B. The Imperative Public Importance of the Constitutionality of PPACA and the Proper Scope of Severance Justify Deviation from Normal Appellate Practice	18
C. This Case Is "Cert. Worthy" In its Own Right and Is a Good Vehicle for Resolving Constitutional Issues Which Have Been Variously Decided Around the Country and Which Can Only Be Finally Decided in this Court	19
CONCLUSION	23

TABLE OF CONTENTS – Continued

Page

INDEX TO APPENDIX

Commonwealth of Virginia v. Kathleen Sebelius

Memorandum Opinion, granting Virginia's Motion for Summary Judgment Virginia v. Sebelius—Eastern District of Virginia—No. 3:10cv188 (Dec. 13, 2010) ..... App. 1

Order Granting Plaintiff's Motion for Summary Judgment Virginia v. Sebelius—Eastern District of Virginia—No. 3:10cv188 (Dec. 13, 2010) ..... App. 52

Memorandum Opinion, denying Defendant's Motion to Dismiss Virginia v. Sebelius—Eastern District of Virginia—No. 3:10cv188 (Aug. 2, 2010) ..... App. 54

Order Denying Defendant's Motion to Dismiss Virginia v. Sebelius—Eastern District of Virginia—No. 3:10cv188 (Aug. 2, 2010) ..... App. 90

Order Consolidating Case Nos. 11-1057 and 11-1058 Virginia v. Sebelius—U.S. Court of Appeals for the Fourth Circuit No. 11-1057(L) (Jan. 20, 2011) ..... App. 92

Docketing Notice, Appeal from District Court Virginia v. Sebelius—U.S. Court of Appeals for the Fourth Circuit No. 11-1057 (Jan. 20, 2011) ..... App. 95

Constitutional Provisions ..... App. 98

Federal Statutory Provision § 1501 of PPACA ..... App. 99

State Statutory Provision ..... App. 116

TABLE OF CONTENTS – Continued

Page

Patient Protection and Affordable Care Act—(PPACA) Public Law 111-148 HR3590—(March 23, 2010)—Table of Contents..... App. 117

Excerpt from Memorandum in Opposition to Plaintiff's Motion for Summary Judgment Virginia v. Sebelius—Eastern District of Virginia—No. 3:10cv188 (Sept. 23, 2010) ... App. 148

Excerpt of Transcript of Motions hearing before Honorable Henry E. Hudson Virginia v. Sebelius—Eastern District of Virginia—No. 3:10cv188 (Oct. 18, 2010)..... App. 150

Excerpt of Plaintiff's Memorandum in Support of Motion for Summary Judgment Virginia v. Sebelius—Eastern District of Virginia—No. 3:10cv188 (Sept. 3, 2010) Commonwealth's Statement of Undisputed Facts..... App. 152

Excerpt from Memorandum in Opposition to Plaintiff's Motion for Summary Judgment Virginia v. Sebelius—Eastern District of Virginia—No. 3:10cv188 (Sept. 23, 2010) Response to Plaintiff's Statement of Material Facts..... App. 159

Excerpt from Memorandum in Support of Defendant's Motion for Summary Judgment Virginia v. Sebelius—Eastern District of Virginia—No. 3:10cv188 (Sept. 3, 2010) Statement of Undisputed Material Facts ..... App. 163

TABLE OF CONTENTS – Continued

Page

Excerpt of Plaintiff's Memorandum in Opposition to Secretary's Motion for Summary Judgment Virginia v. Sebelius—Eastern District of Virginia—No. 3:10cv188 (Sept. 23, 2010) Response to Statement of Facts ..... App. 182

Civil Docket for Case—Virginia v. Sebelius—3:10cv188 U.S. District Court—Eastern District of Virginia—(Richmond) ..... App. 186

TABLE OF AUTHORITIES

Page

CASES

Alaska Airlines, Inc. v. Brock,
480 U.S. 678 (1987) 10, 22

Alaska v. U.S. Dept. of Transp.,
868 F.2d 441 (D.C. Cir. 1989) 7

Alfred L. Snapp & Sons v. Puerto Rico ex rel. Barez,
458 U.S. 592 (1982) 7

Carter v. Carter Coal Co.,
298 U.S. 238 (1936) 17, 18

Child Labor Tax Case,
259 U.S. 20 (1922) 9, 19

Commonwealth of Virginia, ex rel. Cuccinelli v. Sebelius,
702 F. Supp. 2d 598 (E.D. Va. 2010) 1, 10

Dep't of Rev. of Mont. v. Kurth Ranch,
511 U.S. 767 (1994) 9

Diamond v. Charles,
476 U.S. 54 (1986) 7

Florida v. United States Dep't of Health and Human Servs.,
2011 WL 285683, No. 3:10cv91
(N.D. Fla. Jan. 31, 2011) 19, 20

Gonzales v. Raich,
545 U.S. 1 (2005) 6

Gratz v. Bollinger,
539 U.S. 244 (2003) 17, 18

TABLE OF AUTHORITIES—Continued

Page

In re: Leckie Smokeless Coal Co. v. United Mine Workers of America,
99 F.3d 573 (4th Cir. 1996) 8

Liberty University v. Geithner,
2010 WL 4860299, No. 6:10cv15
(W.D. Va. Nov. 30, 2011) 12, 13, 17, 20

Maine v. Taylor,
477 U.S. 131 (1986) 7

Mistretta v. United States,
488 U.S. 361 (1989) 16, 19

New Haven Inclusion Cases,
399 U.S. 392 (1970) 16, 18

New York v. United States,
505 U.S. 144 (1992) 7

Ohio v. USDOT,
766 F.2d 228 (6th Cir. 1985) 7

Porter v. Dicken,
328 U.S. 252 (1946) 17

Printz v. United States,
521 U.S. 898 (1997) 7

Railroad Retirement Board v. Alton R. Co.,
295 U.S. 330 (1935) 17, 18

Regional Rail Reorganization Act Cases,
419 U.S. 102 (1974) 8

Rodriguez de Quijas v. Shearson/ American Express,
490 U.S. 477 (1989) 19

TABLE OF AUTHORITIES—Continued

Page

South Carolina v. Regan,
465 U.S. 367 (1984) 8

St. Louis, Kansas City & Col. R.R. Co. v. Wabash R.R. Co.,
217 U.S. 247 (1910) 17

State of Florida v. United States Department of Health and Human Services,
716 F. Supp. 2d 1120 (N.D. Fla. 2010) 11

Stolt-Nielsen S.A. v. AnimalFeeds Int'l Corp.,
130 S. Ct. 1758 (2010) 8

Tex. Ofc. of Pub. Util. Counsel v. FCC,
183 F.3d 393 (5th Cir. 1999) 7

Thomas More Law Center v. Obama,
720 F. Supp. 2d 882 (E.D. Mich. 2010) 10, 17, 20

United States v. Bankers Trust Co.,
294 U.S. 240 (1935) 18

United States v. Butler,
297 U.S. 1 (1936) 9

United States v. LaFranca,
282 U.S. 568 (1931) 9

United States v. Lopez,
514 U.S. 549 (1995) 6

United States v. Morrison,
529 U.S. 598 (2000) 6

United States v. Reorganized (F&I) Fabricators of Utah, Inc.,
518 U.S. 213 (1996) 9

TABLE OF AUTHORITIES—Continued

Page

United States v. United Mine Workers of America, 330 U.S. 258 (1947) 16, 18, 20

Wickard v. Filburn, 317 U.S. 111 (1942) 6

Wyoming ex rel. Crank v. United States, 539 F.3d 1236 (10th Cir. 2008) 7

Youngstown Sheet & Tube Co., 343 U.S. 579 (1952) 18

CONSTITUTIONAL PROVISIONS

U.S. Const. art. I, § 8 ..... 2, 20

STATUTES

26 U.S.C. § 4980H(a) 15

26 U.S.C. § 5000A 3, 21

26 U.S.C. § 7421(a) 8, 11, 12, 20

28 U.S.C. § 347(a) 20

28 U.S.C. § 1254(1) 2, 20

28 U.S.C. § 2101(e) 2

28 U.S.C. § 2201 8

28 U.S.C. § 2201(a) 8

28 U.S.C. § 2201(e) 2

29 U.S.C. § 218a 15

42 U.S.C. § 18001 14

TABLE OF AUTHORITIES—Continued

Page

42 U.S.C. § 18021 15

42 U.S.C. § 18022 15

42 U.S.C. § 18031 14

42 U.S.C. § 18101 15

Health Care and Education Reconciliation Act of 2010, P.L. 111-152, 124 Stat. 1029 (2010) 2, 3

Patient Protection and Affordable Care Act of 2010, P.L. 111-148, 124 Stat. 119 (2010) ... 2, 3, 4, 5, 6, 8, 10, 11, 12, 13, 14, 15, 16, 18, 22, 23

PPACA § 1501 6

Virginia Code § 2.2-507 5

Virginia Code § 2.2-513 5

Virginia Code § 38.2-3430.1:1 4

RULES

Sup. Ct. R. 11 ..... 2, 12, 13, 16, 17, 18, 19

OTHER AUTHORITIES

Congressional Budget Office Memorandum, *The Budgetary Treatment of an Individual Mandate to Buy Health Insurance*, August 1994 4

TABLE OF AUTHORITIES—Continued

Page

Jennifer Staman & Cynthia Brougher, Congressional Research Service, *Requiring Individuals to Obtain Health Insurance: A Constitutional Analysis*, July 24, 2009 4

PETITION FOR WRIT OF CERTIORARI BEFORE JUDGMENT

The Commonwealth of Virginia, ex rel. Kenneth T. Cuccinelli, II, in his official capacity as Attorney General of Virginia, petitions for a writ of certiorari before judgment in a case pending on appeal to the United States Court of Appeals for the Fourth Circuit.

OPINION BELOW

The opinion of the district court denying the Secretary's Motion to Dismiss is reported as *Commonwealth of Virginia, ex rel. Cuccinelli v. Sebelius*, 702 F. Supp. 2d 598 (E.D. Va. 2010). That decision and the Memorandum Opinion granting summary judgment to Virginia are reprinted in the Appendix ("App.") at App. 1-53.

JURISDICTION

The judgment of the district court was entered on December 13, 2010. Notices of appeal were timely filed within 60 days of judgment by the Secretary and by the Commonwealth of Virginia on January 18, 2011. The appeals were consolidated and docketed in the court of appeals on January 20, 2011 as *Commonwealth of Virginia v. Kathleen Sebelius*, No. 11-1057. Accordingly, the jurisdiction of this Court is

invoked under 28 U.S.C. §§ 1254(1) and 2101(e), and Rule 11 of this Court.

CONSTITUTIONAL AND STATUTORY PROVISIONS

Because the constitutional and statutory provisions involved in this case are lengthy, they are cited here as U.S. Const. art. I, § 8 and 124 Stat. 119 (2010), as amended by 124 Stat. 1029 (2010). Pertinent provisions are reproduced in the Appendix. (See App. at 98-147).

STATEMENT OF THE CASE

The Patient Protection and Affordable Care Act, Pub. L. No. 111-148, 124 Stat. 119 (2010), ("PPACA") imposes complex and significant regulatory changes on all 50 States. Businesses also must come to grips with the intricate requirements of the law and dramatically reorder the way health insurance is provided to their employees. PPACA was challenged from the moment it was signed. A steady drumbeat of new lawsuits continues to punctuate the news. Despite the regulatory overhaul PPACA imposes on the States, uncertainty surrounds the law. In carefully reasoned opinions, two district courts have found that Congress overstepped its authority in enacting all or part of PPACA. Other courts have disagreed, leaving the States and businesses unsure

whether PPACA's complex requirements, or parts of them, will survive. Given the importance of the issues at stake to the States and to the economy as a whole, this Court should grant certiorari to resolve a matter of imperative public importance.

The United States Senate passed PPACA, on Christmas Eve 2009, on a straight party line vote without a single vote to spare. Cobbled together in secret, PPACA was passed through without committee hearing or report, employing such florid deal-making as to generate scornful popular terms like "the Louisiana Purchase" and "the Cornhusker Kick-back." (App. at 156-57).

At the heart of PPACA's financing scheme is § 1501,[1] which requires American citizens, with certain exceptions, to purchase a good or service from other citizens; to wit, a policy of insurance complying with federal standards. (App. at 102-115). Although Congress purported to be exercising Commerce Clause powers in enacting PPACA, as amended by the Health Care and Education Reconciliation Act of 2010, Pub. L. No. 111-152, 124 Stat. 1029 (2010), this claim was known to be problematical. When the Senate Finance Committee had asked the Congressional Research Service whether a mandate supported by a penalty would be constitutional, the response was equivocal: "Whether such a requirement would be constitutional under the Commerce Clause

---

[1] Section 1501 is now codified at 26 U.S.C. § 5000A.

is perhaps the most challenging question posed by such a proposal, as it is a novel issue whether Congress may use this clause to require an individual to purchase a good or a service."[2] Because an intervening election in Massachusetts removed the availability of cloture in the Senate, PPACA was passed by the House of Representatives unaltered, and then subjected to minor amendment in a reconciliation process dealing as much with college loans as with health care.

Meanwhile, at the 2010 Regular Session of the Virginia General Assembly, the Virginia Health Care Freedom Act, *Virginia Code* § 38.2-3430.1:1, had been enacted with the assent of the Governor. (App. at 116). That act provides in pertinent part:

> No resident of this Commonwealth, regardless of whether he has or is eligible for health insurance coverage under any policy or program provided by or through his employer, or a plan sponsored by the Commonwealth or the Federal Government, shall be required to obtain or maintain a policy of individual insurance coverage

---

[2] Jennifer Staman & Cynthia Brougher, Congressional Research Service, *Requiring Individuals to Obtain Health Insurance: A Constitutional Analysis*, July 24, 2009 at 3, 6. *See also* Congressional Budget Office Memorandum, *The Budgetary Treatment of an Individual Mandate to Buy Health Insurance*, August 1994 ("A mandate requiring all individuals to purchase health insurance would be an unprecedented form of federal action.").

> except as required by a Court or the Department of Social Services where an individual is named a party in a judicial or administrative proceeding.

This legislation was enacted in several identical versions on a bi-partisan basis, with margins as high as 90 to 3 in the House of Delegates and 25 to 15 in the Senate. At the time of enactment, the Virginia House of Delegates was composed of 59 Republicans, 39 Democrats and 2 Independents, while the Virginia Senate contained 22 Democrats and 18 Republicans. (App. at 157).

The Attorney General of Virginia has the duty to defend the legislative enactments of the Commonwealth. *Virginia Code* §§ 2.2-507; 2.2-513. When the President signed PPACA on March 23, 2010, the validity of both the Federal and State enactments were drawn into question. If PPACA was supported by an enumerated power, then it would prevail under the Supremacy Clause. If not, the Health Care Freedom Act would be a valid exercise of the police powers reserved to the States. In order to resolve this conflict, Virginia filed a Complaint in the United States District Court for the Eastern District of Virginia for Declaratory and Injunctive Relief. (App. at 54-55).

The gravamen of the Complaint was that the claimed power to require a citizen to purchase a good or a service from another citizen lacks any principled limit and is tantamount to a national police power.

Virginia demonstrated below that since *Wickard v. Filburn*, 317 U.S. 111 (1942), this Court has reached no further than to hold that Congress can regulate (1) "use of the channels of interstate commerce," (2) "the instrumentalities of interstate commerce, or persons and things in interstate commerce," and (3) "**activities** that substantially affect interstate commerce." *United States v. Lopez*, 514 U.S. 549, 558-59 (1995) (emphasis added). Section 1501 of PPACA seeks to regulate **inactivity** affecting interstate commerce, a claimed power well in excess of the affirmative outer limits of the Commerce Clause heretofore recognized, even as executed by the Necessary and Proper Clause. *See Gonzales v. Raich*, 545 U.S. 1 (2005). This claimed power also violates the negative outer limits of the Commerce Clause identified in *Lopez* and in *United States v. Morrison*, 529 U.S. 598 (2000). As was so clearly stated in *Morrison*: "We *always* have rejected readings of the Commerce Clause and the scope of federal power that would permit Congress to exercise a police power." *Morrison*, 529 U.S. at 618-19 (emphasis in original). *See also Morrison*, 529 U.S. at 663 (recognizing that heightened scrutiny might be justified where Congress acted in haste without taking "a hard look" at federalism issues or if it otherwise followed questionable procedures.) (Breyer, J., dissenting).

On May 24, 2010, the Secretary filed a motion to dismiss premised upon lack of standing, the Anti-Injunction Act, ripeness and failure to state a claim. The motion was fully briefed and extensively

argued. (App. at 56-57). Ten amici were granted leave to file and did file briefs in support or in opposition. (App. at 194-205).

With respect to standing, Virginia argued that states suffer a sovereign injury and have standing to claim that the national government is acting in excess of its enumerated powers whenever their code of laws is attacked or whenever they are otherwise commanded to give way. *See, e.g., Printz v. United States*, 521 U.S. 898 (1997); *New York v. United States*, 505 U.S. 144, 155 (1992); *Maine v. Taylor*, 477 U.S. 131, 137 (1986) ("a State clearly has a legitimate interest in the continued enforceability of its own statutes"); *Diamond v. Charles*, 476 U.S. 54, 62, 65 (1986) ("a State has standing to defend the constitutionality of its statute"); *Alfred L. Snapp & Sons v. Puerto Rico ex rel. Barez*, 458 U.S. 592, 601 (1982) ("[T]he power to create and enforce a legal code, both civil and criminal" is a core State function); *Wyoming ex rel. Crank v. United States*, 539 F.3d 1236, 1242 (10th Cir. 2008) (State has standing to defend the efficacy of its expungement statute from pre-emption threatened by a federal agency's interpretation of federal law); *Tex. Ofc. of Pub. Util. Counsel v. FCC*, 183 F.3d 393, 449 (5th Cir. 1999) ("'States have a sovereign interest in the power to create and enforce a legal code.'") (citing *Alfred L. Snapp & Sons*); *Alaska v. U.S. Dept. of Transp.*, 868 F.2d 441, 443-45 (D.C. Cir. 1989) ("pre-emptive effect [of federal regulations] is the injury" sufficient to confer Article III standing); *Ohio v. USDOT*, 766 F.2d

228, 232-33 (6th Cir. 1985) ("since Ohio is litigating the constitutionality of its own statute," it has standing).

With regard to the Anti-Injunction Act, 26 U.S.C. § 7421(a), and its parallel tax provisions in the Declaratory Judgment Act, 28 U.S.C. § 2201(a), Virginia noted that these statutes establish a "pay and sue" rule whereby assessed taxes must be paid before being challenged. Virginia argued that this Court has made it clear that the Anti-Injunction Act does not apply to non-taxpayer States. *South Carolina v. Regan*, 465 U.S. 367 (1984). This proposition necessitates the conclusion that there is similarly no bar under the Declaratory Judgment Act, 28 U.S.C. § 2201. *In re: Leckie Smokeless Coal Co. v. United Mine Workers of America*, 99 F.3d 573, 583-84 (4th Cir. 1996) (on this proposition, the acts are coextensive).

Virginia further argued that considerations of ripeness are no bar because the collision between PPACA and the Virginia enactment are patent. "Where the inevitability of the operation of a statute against certain individuals is patent, it is irrelevant to the existence of a justiciable controversy that there will be a time delay before the disputed provisions will come into effect." *Stolt-Nielsen S.A. v. AnimalFeeds Int'l Corp.*, 130 S. Ct. 1758, 1767 n.2 (2010), quoting *Regional Rail Reorganization Act Cases*, 419 U.S. 102, 143 (1974).

Finally, with respect to the motion to dismiss for failure to state a claim, Virginia maintained that it was clear Congress was claiming a power never before asserted and was operating beyond the affirmative and negative limits of the Commerce Clause as heretofore recognized. Under these circumstances it was plausible that a claim had been stated for violation of the Commerce Clause. Likewise, the Commonwealth made a plausible argument that the Secretary's alternative claims based upon the taxing powers were unsound.

On the tax issue, the threshold problem for the Secretary is that there is a justiciable difference between a tax and a penalty. *United States v. LaFranca*, 282 U.S. 568, 572 (1931). "'A tax is an enforced contribution to provide for the support of government; a penalty . . . is an exaction imposed by statute as punishment for an unlawful act.'" *United States v. Reorganized (F&I) Fabricators of Utah, Inc.*, 518 U.S. 213, 224 (1996) (citation omitted). A penalty not supporting a tax is not a tax penalty but a naked penalty requiring an enumerated power other than the taxing power to support it. Furthermore, even if the penalty were a tax "there comes a time in the extension of the penalizing features of the so-called tax when it loses its character as such and becomes a mere penalty with the characteristics of a regulation and punishment." *Dep't of Rev. of Mont. v. Kurth Ranch*, 511 U.S. 767, 779 (1994). *See also United States v. Butler*, 297 U.S. 1, 68 (1936); *Child Labor Tax Case*, 259 U.S. 20, 38 (1922). Because at this

point the penalty requires a supporting enumerated power independent of the taxing power—and the only possible one would be the Commerce Clause—the tax argument collapses back into the Commerce Clause argument.

Based upon these authorities and considerations the district court denied the motion to dismiss on August 2, 2010. *Commonwealth of Virginia v. Sebelius*, 702 F. Supp. 2d 598 (E.D. Va. 2010). (App. at 89).

On August 16, 2010, the Secretary filed her Answer. (App. at 207). On September 3, 2010 the parties filed cross-motions for summary judgment. (App. at 2). They were supported or opposed in twelve briefs amicus curiae, including briefs filed on behalf of former Attorneys General Barr, Meese, and Thornburgh, and in briefs filed on behalf of eighteen law professors. (App. at 209-22). On the threshold and merits issues, Virginia argued in conformity with its positions at the motion to dismiss stage. With respect to remedy, Virginia argued that under the legislative bargain prong of *Alaska Airlines, Inc. v. Brock*, 480 U.S. 678 (1987), the mandate and penalty, if unconstitutional, are not severable from the remainder of PPACA. On the second prong of *Alaska Airlines*, which turns on the ability of remaining provisions to function without the stricken parts, the Secretary conceded that changes in insurance regulation, such as guaranteed issue and community rating, were not severable from the mandate and penalty. (App. at 148-49, 151). Indeed, the Secretary asserted that the changes in insurance would collapse

that industry without the mandate and penalty. (App. at 148-49). Virginia argued in the alternative that at least all means of financing the PPACA scheme, including Medicare and Medicaid changes, had been intended to work together and could not be severed from the mandate and penalty. (App. at 46).

On October 7, 2010, the United States District Court for the Eastern District of Michigan in *Thomas More Law Center v. Obama*, 720 F. Supp. 2d 882 (E.D. Mich. 2010), found that the private party plaintiffs that were before it had standing, found that their claims were ripe, found that the penalty was not a tax triggering the Anti-Injunction Act and ruled that PPACA is a constitutional exercise of power under the Commerce Clause. The Secretary filed her Notice of Supplemental Authority on October 8, 2010 bringing that decision to the attention of the district court in the Eastern District of Virginia. (App. at 221).

On October 14, 2010, the United States District Court for the Northern District of Florida in *State of Florida v. United States Department of Health and Human Services*, 716 F. Supp. 2d 1120 (N.D. Fla. 2010), denied the motion to dismiss filed by the United States. In the course of its decision that court held that PPACA could not be sustained under the taxing power. *Id.* at 1139-40. Virginia filed its Notice of Supplemental Authority the same day bringing that decision to the attention of the district court. (App. at 223).

On November 30, 2010, the United State District Court for the Western District of Virginia in *Liberty University v. Geithner*, 2010 WL 4860299, No. 6:10cv15 (W.D. Va. Nov. 30, 2011), found that the claims of Liberty University and two individuals conferred standing upon them and were ripe for adjudication. The mandate and penalty were found not to trigger the Anti-Injunction Act and PPACA was upheld as a constitutional exercise of Congressional Commerce Clause power. The Secretary filed her Notice of Supplemental Authority on December 3, 2010 bringing this decision to the attention of the district court. (App. at 225).

On December 13, 2010, the district court granted Virginia's Motion for Summary Judgment and declared PPACA unconstitutional. (App. at 52-53). The Secretary filed her Notice of Appeal on January 18, 2011. (App. at 225). Because the district court had ruled that the mandate and penalty were severable, Virginia filed a Notice of Appeal the same day. (App. at 225). The cases were consolidated by Order dated January 20, 2011 and the consolidated appeals were docketed in the Fourth Circuit that day. (App. at 92-94, 95). Hence, this petition is ripe under Rule 11.

On January 26, 2011, the Secretary and Virginia filed a Joint Motion to Expedite Briefing and to Schedule Oral Argument for May 2011. (Case 11-1057 Doc. 13). The Motion was Granted the same day, (Case 11-1057 Doc. 15), and oral argument is tentatively scheduled for the May 10-13 session, to be

conducted *seriatim* with argument in the *Liberty University* case. (Case 11-1057 Doc. 24).

On January 28, 2011, the Secretary filed her non-binding Statement of Issues on appeal. (Case 11-1057 Doc. 17 at 3). That statement is repeated *supra* as Questions Presented No. 1 and No. 2.

REASONS FOR GRANTING THE PETITION

A petition for writ of certiorari before judgment in a court of appeals will be granted "only upon a showing that the case is of such imperative public importance as to justify deviation from normal appellate practice and to require immediate determination in this Court." Sup. Ct. R. 11.

A. This Case Is of Imperative National Importance Requiring Immediate Determination in this Court.

PPACA has roiled America. The party that unanimously opposed PPACA in the House of Representatives has just seen its largest electoral gains in over seventy years. With the intervention of six additional states in the Florida suit on January 19, 2011, it became possible for the first time in American history to count a clear majority of states in litigation with the federal government, each claiming that the federal government has exceeded its enumerated powers. That same day the House of Representatives voted to repeal PPACA on a vote of

245 to 189. On January 21, 2011, Oklahoma filed suit in the Eastern District of Oklahoma to vindicate a recently enacted constitutional amendment which conflicts with PPACA.

Despite these developments, the States, citizens and the economy remain mired in uncertainty. Because the changes effected by PPACA are so massive, the States are forced to devote considerable resources now to meet the requirements of a congressional enactment that this Court may find invalid. In Virginia, some of the key agencies involved with PPACA include the Office of the Secretary of Health and Human Resources, the Department of Medical Assistance Services, the Department of Health, the Bureau of Insurance, and the state medical teaching hospitals. Virginia must assess whether to develop a high risk pool or default to the federal government, overhaul its insurance laws, and create a health benefit exchange. *See, e.g.*, 42 U.S.C. §§ 18001 (high risk pools); 18031 (health benefit exchanges). The latter entails the administrative costs associated with creating an entirely new agency, expanding an existing agency, or providing support for an independent entity. The General Assembly of Virginia is presently considering complex bills on a variety of PPACA-related issues.[3] All 50 states

---

[3] *See* House Bills 1928, 1958, (both overhauling various aspects of Virginia insurance law in light of PPACA); 2434 (creating a Health Benefit Exchange), and Senate Bill 1366 (same). Information about these bills is available at the General Assembly's website, http://leg1.state.va.us/lis.htm

currently are undertaking similar efforts. States are also struggling to determine the costs of expanding the Medicaid program and how to cope with them.

Citizens and businesses are widely believed to be reducing spending and delaying hiring in response to the overhang of uncertainty. Under PPACA, effective December 31, 2013, hardly a distant horizon, certain employers with more than 50 employees who do not offer health insurance as a benefit will have to pay a fee of $2,000 per every full-time employee.[4] Any employer who employs more than 200 employees and offers insurance to those employees must automatically enroll new employees in this insurance, and continue to maintain insurance for existing employees already enrolled in this insurance.[5] Employers will have to offer vouchers allowing qualified employees to obtain coverage through a state-run insurance exchange rather than through the employer.[6] PPACA also establishes minimum standards of coverage that health insurance plans must achieve to be considered a "qualified health plan."[7] What satisfies the definition of a qualified health plan will be determined through the HHS regulations. Hundreds of businesses have sought and

---

[4] 26 U.S.C. § 4980H(a).

[5] 29 U.S.C. § 218a.

[6] 42 U.S.C. § 18101.

[7] 42 U.S.C. §§ 18021, 18022.

obtained waivers from certain PPACA requirements, but those waivers are temporary.[8]

Given the burdens and uncertainties associated with PPACA, it is not surprising that the Governor, Lieutenant Governor and Speaker of the House of Delegates of the Commonwealth of Virginia have requested the Attorney General to seek expedited appeal. The Secretary herself, in her Joint Motion to Expedite Briefing and to Schedule Oral Argument for May 2011, filed in the Fourth Circuit on January 26, has agreed that "[t]he constitutionality of the Affordable Care Act has public policy implications of the highest magnitude." (Case 11-1057 Doc. 13 at 3).

There is a palpable consensus in this country that the question of PPACA's constitutionality must be and will be decided in this Court. Under these circumstances, the issues presented here should be considered to be at least as important as those presented in many of the cases where immediate review has been permitted under Rule 11 or its predecessors. Such cases include challenges to the legality of the Federal Sentencing Guidelines, *Mistretta v. United States*, 488 U.S. 361 (1989), the reorganization of two railroads, *New Haven Inclusion Cases*, 399 U.S. 392, 418 (1970), a coal strike, *United States v. United Mine Workers of America*, 330 U.S.

---

[8] http://www.hhs.gov/ociio/regulations/approved_applications_for_waiver.html (noting that 711 waivers that must be renewed annually were issued for FY 2011).

258, 269 (1947), a denial of the power of a federal court to enforce rent control, *Porter v. Dicken*, 328 U.S. 252 (1946), a constitutional challenge to the Bituminous Coal Conservation Act, *Carter v. Carter Coal Co.*, 298 U.S. 238, 285 (1936), a constitutional challenge to the Railroad Retirement Act, *Railroad Retirement Board v. Alton R. Co.*, 295 U.S. 330, 340 (1935), and the effect of a railroad dispute on the economy of St. Louis, Missouri. *St. Louis, Kansas City & Col. R.R. Co. v. Wabash R.R. Co.*, 217 U.S. 247, 250-51 (1910).

Rule 11 also has been employed to enable this Court to gather a number of cases so as to permit it to make a constitutional assessment in a wider range of circumstances. *Gratz v. Bollinger*, 539 U.S. 244, 259-60 (2003). It should be so employed here. In both *Thomas More Law Center* and in the *Liberty University* cases, the Department of Justice failed to independently cross appeal standing. Because that issue is jurisdictional, it is not waivable and may be asserted by a party at anytime or by this Court *sua sponte*. As a consequence, it cannot be known prior to decision whether those cases provide a good vehicle for reaching the constitutional merits. Sovereign standing, on the other hand, is more categorically established than is individual standing, which in any specific case turns on the particular facts of that case. Granting certiorari in this case will ensure a good vehicle for merits review. Granting certiorari in this case and then expanding it to reach all merits decisions pending in the courts of appeal would serve

the aggregation interest recognized in *Gratz*, 539 U.S. at 259-60.

The United States District Court for the Northern District of Florida declared PPACA unconstitutional in its entirety on January 31, 2011. Enlarging a grant of certiorari in this case to include that case once an appeal is docketed would further expand and develop the records on which the issue of severability can be considered.

B. The Imperative Public Importance of the Constitutionality of PPACA and the Proper Scope of Severance Justify Deviation from Normal Appellate Practice.

The paradigm cases for the grant of Rule 11 review are challenges to federal power involving significant national economic impact. *See, e.g., New Haven Inclusion Cases*, 399 U.S. 392; *Youngstown Sheet & Tube Co.*, 343 U.S. 579, 584-85 (1952); *United Mine Workers of Am.*, 330 U.S. 258; *Carter Coal Co.*, 298 U.S. 238; *Alton R. Co.*, 295 U.S. 330; *United States v. Bankers Trust Co.*, 294 U.S. 240, 243 (1935). The pending case shares both aspects of those cases: constitutional questions and significant national economic effect. Furthermore, the presence of pure issues of constitutional law on the merits ensures that normal appellate practice will not further focus the controlling issues, which, in any event, are bottomed on decisions of this Court. Indeed, because the constitutionality of PPACA can only be resolved

by determining whether and to what extent this Court will enlarge the existing affirmative and negative outer limits of the Commerce Clause, or overrule the *Child Labor Tax Case*, it is not clear to what extent the courts of appeal are even entitled to engage in independent legal development in the face of binding precedent from this Court. *See Rodriguez de Quijas v. Shearson/American Express*, 490 U.S. 477, 484 (1989) (this Court has the exclusive prerogative to reverse its own cases).[9]

C. This Case Is "Cert. Worthy" In its Own Right and Is a Good Vehicle for Resolving Constitutional Issues Which Have Been Variously Decided Around the Country and Which Can Only Be Finally Decided in this Court.

This Court has deemed a split among district courts in different circuits as a factor weighing in favor of granting certiorari under Rule 11. *Mistretta v. United States*, 488 U.S. 361, 371 (1989). Such a split

---

[9] The district courts in Virginia and Florida expressly recognized this point. *See* App. at 44 (relying on this Court's cases to reject the argument that the "penalty" is a tax, while recognizing that the line of cases has been criticized by some scholars); *Florida v. United States Dep't of Health and Human Servs.*, 2011 WL 285683, No. 3:10cv91, slip op. 43 (N.D. Fla. Jan. 31, 2011) ("existing case law thus extends only to those 'activities' that have a substantial relationship to, or substantially affect, interstate commerce. I am required to interpret this law as the Supreme Court presently defines it. Only the Supreme Court can redefine or expand it further.").

exists here and has merely been deepened by the Florida decision. *See Florida v. United States Dep't of Health and Human Servs.*, 2011 WL 285683.

This case is a particularly good vehicle for resolving the split because all of the issues raised by the Department of Justice—standing, the Anti-Injunction Act, ripeness, and the limits of the Commerce Clause and of the Taxing Power—have been raised here where they have been exhaustively developed. Although it appears from the non-binding Statement of Issues in the Secretary's Docketing Statement that she does not intend to appeal the Anti-Injunction Act or ripeness, she is pursuing standing. Because the Secretary has not appealed standing in the *Thomas More Law Center* and *Liberty University* cases, they are not reliable vehicles by themselves for assuring merits review because standing is a jurisdictional issue that could be re-raised or raised *sua sponte*. Granting certiorari in this case will ensure that the issue will arrive fully briefed in this court.

The fact that Virginia was the prevailing party below is no barrier to a grant of certiorari. 28 U.S.C. § 1254(1) provides that "any party to any civil or criminal case" may petition for certiorari from "[c]ases in the courts of appeals" both "before and after rendition of judgment or decree." *See also United Mine Workers of America*, 330 U.S. at 269 (former 28 U.S.C. § 347(a), now 28 U.S.C. § 1254(1), "authorizes a petition for certiorari by any party and the granting of certiorari prior to judgment in the

Circuit Court of Appeals."). Furthermore, Virginia's claim of error with respect to severance is derivative of and closely connected with the Secretary's appellate issues.

Having correctly found that the individual mandate and penalty were unconstitutional, the district court in this case turned to the question of severance. The district court recognized that, even in the absence of a severability clause, "[u]nless it is evident that the Legislature would not have enacted those provisions which are within its power, independently of that which is not, the invalid part may be dropped if what is left is fully operative as a law." (App. at 47) (internal quotation and citation omitted). It then noted that the fully operative test can turn on the question "whether the balance of the statute will function in a manner consistent with the intent of Congress in the wake of severance of the unconstitutional provision. . . ." (App. at 48) (internal citation omitted). The district court also noted that another reason to decline to sever an unconstitutional provision of a statute from the remaining whole would arise if a court concluded that Congress would not have enacted the statute "in the absence of the severed unconstitutional provision. . . ." (App. at 48) (internal citation omitted). Ultimately, the district court severed the unconstitutional mandate and penalty from the remainder of the act, writing that it would "sever only Section 1501 and directly-dependent provisions which make specific reference to Section 1501." (App. at 49). Because there are no such

provisions this was error because it failed to execute even the Secretary's concessions.

The Secretary's significant concession regarding severance was that, if the mandate and penalty were found unconstitutional, other "provisions of the Act plainly cannot survive." (App. at 148). In saying this she specifically acknowledged that the "insurance industry reforms" contained in PPACA "cannot be severed from the" mandate and penalty, and therefore, must be stricken if the mandate and penalty are found to be unconstitutional. (App. at 149). Thus, at a minimum, the district court erred in not striking those elements of PPACA when it found the mandate and penalty unconstitutional.

However, the Secretary's concession should have been the beginning of the severance review and not the end. Because all financing provisions, including Medicare and Medicaid changes, were intended to operate together, they should all fall together as well. Indeed, under the legislative bargain prong of *Alaska Airlines, Inc.*, 480 U.S. at 684, PPACA should have been stricken in its entirety because it is as certain as such a thing ever could be that PPACA would not have passed at all without the unconstitutional mandate and penalty.

The decision of the Northern District of Florida striking down PPACA in its entirety has engendered further uncertainty. This too heightens the need for expedited review. Finally, it should be noticed that Virginia satisfied all four elements bearing on the

propriety of injunctive relief. Because the Secretary apparently continues to implement PPACA despite two clear declarations of unconstitutionality, injunctive relief should also be immediately considered.

CONCLUSION

For the foregoing reasons the petition for writ of certiorari before judgment in the court of appeals should be **GRANTED** and then expanded to include all PPACA litigation pending in the courts of appeals.

Respectfully submitted,

KENNETH T. CUCCINELLI, II
Attorney General of Virginia

E. DUNCAN GETCHELL, JR.
Solicitor General of Virginia
dgetchell@oag.state.va.us
Counsel of Record

STEPHEN R. MCCULLOUGH
Senior Appellate Counsel
smccullough@oag.state.va.us

CHARLES E. JAMES, JR.
Chief Deputy Attorney General

WESLEY G. RUSSELL, JR.
Deputy Attorney General
wrussell@oag.state.va.us

OFFICE OF THE
ATTORNEY GENERAL
900 East Main Street
Richmond, Virginia 23219
Telephone: (804) 786-2436
Facsimile: (804) 786-1991

Counsel for the
Commonwealth of Virginia

February 8, 2011

APPENDIX

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF VIRGINIA
Richmond Division

COMMONWEALTH OF VIRGINIA EX REL. KENNETH T. CUCCINELLI, II, in his official capacity as Attorney General of Virginia, Plaintiff v. KATHLEEN SEBELIUS, SECRETARY OF THE DEPARTMENT OF HEALTH AND HUMAN SERVICES, in her official capacity, Defendant.	)	Civil Action No. 3:10CV188-HEH

MEMORANDUM OPINION
(Cross Motions for Summary Judgment)

(Filed Dec. 13, 2010)

In this case, the Commonwealth of Virginia (the "Commonwealth"), through its Attorney General, challenges the constitutionality of the pivotal enforcement mechanism of the health care scheme adopted by Congress in the Patient Protection and Affordable Care Act ("ACA" or "the Act"), Pub. L. No. 111-148, 124 Stat. 119 (2010). At issue is Section 1501 of the Act, commonly known as the Minimum Essential Coverage Provision ("the Provision"). The Minimum Essential Coverage Provision requires that

every United States citizen, other than those falling within specified exceptions, maintain a minimum level of health insurance coverage for each month beginning in 2014. Failure to comply will result in a penalty included with the taxpayer's annual return. As enacted, Section 1501 is administered and enforced as a part of the Internal Revenue Code.

In its Complaint, the Commonwealth seeks both declaratory and injunctive relief. Specifically, the Commonwealth urges the Court to find that the enactment of Section 1501 exceeds the power of Congress under the Commerce Clause and General Welfare Clause of the United States Constitution. Alternatively, the Commonwealth contends that the Minimum Essential Coverage Provision is in direct conflict with Virginia Code Section 38.2-3430.1:1 (2010), commonly referred to as the Virginia Health Care Freedom Act, thus implicating the Tenth Amendment.

As part of the relief sought, the Commonwealth also requests prohibitory injunctive relief barring the United States government from enforcing the Minimum Essential Coverage Provision within its territorial boundaries.

The case is presently before the Court on Motions for Summary Judgment filed by both parties pursuant to Federal Rule of Civil Procedure 56. Both sides have again filed well-researched memoranda supplying the Court with a thorough analysis of the controlling issues and pertinent jurisprudence. The

Court heard oral argument on October 18, 2010. As this Court previously cautioned, this case does not turn on the wisdom of Congress or the public policy implications of the ACA. The Court's attention is focused solely on the constitutionality of the enactment.

A review of the supporting memoranda filed by each party yields no material facts genuinely in issue and neither party suggests to the contrary. The dispute at hand is driven entirely by issues of law.[1]

The present procedural posture of this case is best summarized by the penultimate paragraph of this Court's Memorandum Opinion denying the Defendant's Motion to Dismiss:

> While this case raises a host of complex constitutional issues, all seem to distill to the single question of whether or not Congress has the power to regulate – and tax – a citizen's decision not to participate in interstate commerce. Neither the U.S. Supreme Court nor any circuit court of appeals has squarely addressed this issue. No reported case from any federal appellate court has extended the Commerce Clause or

---

[1] The Secretary takes issue with the Commonwealth's characterization of aspects of the ACA, its economic impact, and the legislative intent underlying Va. Code Section 38.2-3430.1:1. These disputed facts are neither substantive nor essential to issue resolution, and consequently do not preclude summary judgment. *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 247-48, 106 S. Ct. 2505, 2510 (1986).

> Tax Clause to include the regulation of a person's decision not to purchase a product, notwithstanding its effect on interstate commerce.

(Mem. Op. 2, Aug. 2, 2010, ECF No. 84.)

I.

The Secretary, in her Memorandum in Support of Defendant's Motion for Summary Judgment, aptly sets the framework of the debate: "[t]his case concerns a pure question of law, whether Congress acted within its Article I powers in enacting the ACA." (Def.'s Mem. Supp. Mot. Summ. J. 17, ECF No. 91.) At this final stage of the proceedings, with some refinement, the issues remain the same.

Succinctly stated, the Commonwealth's constitutional challenge has three distinct facets. First, the Commonwealth contends that the Minimum Essential Coverage Provision, and affiliated penalty, are beyond the outer limits of the Commerce Clause and associated Necessary and Proper Clause as measured by U.S. Supreme Court precedent. More specifically, the Commonwealth argues that requiring an otherwise unwilling individual to purchase a good or service from a private vendor is beyond the boundaries of congressional Commerce Clause power. The Commonwealth maintains that the failure, or refusal, of its citizens to elect to purchase health

insurance is not economic activity historically subject to federal regulation under the Commerce Clause.

Alternatively, the Commonwealth contends that the Minimum Essential Coverage Provision cannot be sustained as a legitimate exercise of the congressional power of taxation under the General Welfare Clause. It argues that the Provision is mischaracterized as a tax and is, in actuality, a penalty untethered to an enumerated power. Congress may not, in the Commonwealth's view, exercise such power to impose a penalty for what amounts to passive inactivity.

Lastly, the Commonwealth asserts that Section 1501 is in direct conflict with the Virginia Health Care Freedom Act. Its Attorney General argues that the enactment of the Minimum Essential Coverage Provision is an unlawful exercise of police power, encroaches on the sovereignty of the Commonwealth, and offends the Tenth Amendment to the U.S. Constitution.

The Secretary prefaces her response with an acknowledgement that the debate over the constitutionality of the ACA has evolved into a polemic mix of political controversy and legal analysis. When viewed from a purely legal perspective, the Secretary maintains that the requirement that most Americans obtain a minimum level of health insurance coverage or pay a tax penalty "is well within the traditional bounds of Congress's Article I powers." (Def.'s Mem. Supp. 1.)

Her argument begins with an explanation of the reformative impact of the health care regime created by the Act. "[T]he Act is an important, but incremental, advance that builds on prior reforms of the interstate health insurance market over the last 35 years." (Def.'s Mem. Supp. 1.) The Secretary points to congressional findings that the insurance industry has failed to take corrective action to eliminate barriers which prevent millions of Americans from obtaining affordable insurance. To correct this systemic failure in the interstate health insurance market, Congress adopted a carefully crafted scheme which bars insurers from denying coverage to those with preexisting conditions, and from charging discriminatory premiums on the basis of medical history.

In order to guarantee the success of these reforms, the Secretary maintains that Congress properly exercised its powers under the Commerce Clause, or alternatively the Necessary and Proper Clause, to adopt a regulatory mechanism to effectuate these health care market reform measures, namely the Minimum Essential Coverage Provision. "[B]ecause the Act regulates health care financing [it] is quintessential economic activity." (Def.'s Reply Mem. 3, ECF No. 132.)

Moreover, the Secretary rejects the Commonwealth's contention that the implementation of the Minimum Essential Coverage Provision through the Necessary and Proper Clause violates state sovereignty. Since the penalty mechanism does

not compel state officials to carry out a federal regulatory scheme, she maintains that it does not implicate the Tenth Amendment.

The Secretary also disputes the logic behind the Commonwealth's contention that the Provision compels health care market participation by individuals who do not wish to purchase insurance. She dismisses the notion that uninsured people can sit passively on the market sidelines. Her reasoning flows from the observation that

> the large majority of the uninsured regularly migrate in and out of insurance coverage. That is, the uninsured, as a class, often make, revisit, and revise economic decisions as to how to finance their health care needs. Congress may regulate these economic actions when they substantially affect interstate commerce. . . . Insurance-purchase requirements have long been fixtures in the United States Code.

(Def.'s Mem. Supp. 2.)

Both the Secretary's argument in defense of the Provision and the apparent underlying rationale of Congress are premised on the facially logical assumption that every individual at some point in life will need some form of health care. "No person can guarantee that he will divorce himself entirely from the market for heath care services." (Def.'s Mem. Opp. Mot. Summ. J. 1, ECF No. 96.) "[N]o person can guarantee that he will never incur a sudden, unanticipated need for expensive care; and very few

persons, absent insurance, can guarantee that they will not shift the cost of that care to the rest of society." (Def.'s Reply Mem. 2.) In the Secretary's view, failure to appreciate this logic is the fatal flaw in the Commonwealth's position.[2]

On a third front, the Secretary defends the Minimum Essential Coverage Provision as a valid exercise of Congress's independent authority to lay taxes and make expenditures for the general welfare. Contrary to earlier representations by the Legislative and Executive branches, the Secretary now states unequivocally that the Provision is a tax, published in the Internal Revenue Code, and enforced by the Internal Revenue Service. The Secretary notes that "[i]ts penalty operates as an addition to an individual's income tax liability on his annual tax return, which is calculated by reference to income." (Def.'s Mem. Supp. 2.) The Secretary also cites projections that it will raise $4 billion annually in general revenue. She takes issue with the Commonwealth's position that there is a legal

---

[2] In *Florida ex rel. McCollum v. US. Dep't of Health & Human Servs.*, Judge Vinson aptly captures the theoretic underpinning of the Secretary's argument. "Their argument on this point can be broken down to the following syllogism: (1) because the majority of people will at some point in their lives need and consume healthcare services, and (2) because some of the people are unwilling or unable to pay for those services, (3) Congress may regulate everyone and require that everyone have specific, federally-approved insurance." 716 F. Supp. 2d 1120, 1162 (N.D. Fla. 2010).

distinction between penalties that serve regulatory purposes and other forms of revenue raising taxation. In her opinion, any such legal distinction has long been abandoned by the Supreme Court.[3]

Finally, the Secretary highlights several precepts of legal analysis which she suggests should guide the Court in reviewing the issues raised. First, she cautions the Court to remember that the standard for facial challenges establishes a high hurdle. It requires the Commonwealth to demonstrate that there are no possible circumstances in which the Provision could be constitutionally applied. *United States v. Salerno,* 481 U.S. 739, 745, 107 S. Ct. 2095, 2100 (1987). In other words, they "must show that the [statute] cannot operate constitutionally under any circumstance." *West Virginia v. U.S. Dep't of Health & Human Servs.,* 289 F.3d 281, 292 (4th Cir. 2002). Proof of a single constitutional application is all that is necessary in her view. In summary, she explains

> for Virginia's facial challenge to succeed under its theory, this Court would have to conclude that no uninsured individual would ever use or be charged for medical services, and that no uninsured individual would ever

---

[3] Because the Minimum Essential Coverage Provision is incorporated into the Internal Revenue Code, and technically under the purview of the Secretary of the Treasury, Secretary Sebelius, at this late stage, maintains that the Secretary of the Treasury is a necessary party, whose absence as such warrants dismissal. This aspect of her motion was rejected by a separate Memorandum Order (Dk. No. 152) dated October 13, 2010.

> make an active decision whether to purchase insurance. Because such a showing cannot be made, Virginia's facial challenge must fail.

(Def.'s Mem. Opp. 19.)

On this issue, the Secretary holds the weaker hand. The cases she relies upon, *Salerno* and *West Virginia,* which are styled as facial challenges, focus on the impact or effect of the enactment at issue. The immediate lawsuit questions the authority of Congress – at the bill's inception – to enact the legislation. The distinction is somewhat analogous to subject matter jurisdiction, the power to act ab initio. By their very nature, almost all constitutional challenges to specific exercises of enumerated powers, particularly the Commerce Clause, are facial. "When . . . a federal statute is challenged as going beyond Congress's enumerated powers, under our precedents the court first asks whether the statute is unconstitutional *on its face*." *Nev. Dep't of Human Res. v. Hibbs,* 538 U.S. 721, 743, 123 S. Ct. 1972, 1986 (2003) (Scalia, J., dissenting); *see also City of Boerne v. Flores,* 521 U.S. 507, 516, 117 S. Ct. 2157, 2162 (1997). A careful examination of the Court's analysis in *Lopez* and *Morrison* does not suggest the standard articulated in *Salerno.* In both *Lopez* and *Morrison,* the Court declared the statute under review to be legally stillborn without consideration of its effect downstream.

In fact, the viability of the *Salerno* dictum cited by the Secretary has been questioned by the Court in

City of Chicago v. Morales, 527 U.S. 41, 119 S. Ct. 1849 (1999). "To the extent we have consistently articulated a clear standard for facial challenges, it is not the *Salerno* formulation, which has never been the decisive factor in any decision of this Court, including *Salerno* itself." *Id.* at 55 n.22, 119 S. Ct. at 1858 n.22. *See also Fargo Women's Health Org. v. Schafer,* 507 U.S. 1013, 1013, 113 S. Ct. 1668, 1669 (1993) (O'Connor, J., concurring in denial of stay and injunction); *Planned Parenthood v. Miller,* 63 F.3d 1452, 1458 (8th Cir. 1995).

Even if the Commonwealth is held to the higher standard of proof, unconstitutionality in all applications, it could be met if the enforcement mechanism is itself unconstitutional. Importantly, it is not the effect on individuals that is presently at issue – it is the authority of Congress to compel *anyone* to purchase health insurance. An enactment that exceeds the power of Congress to adopt adversely affects everyone in every application. Indeed, the Minimum Essential Coverage Provision touches every American citizen required to file an annual IRS Form 1040 or 1040A.[4]

Second, the Secretary correctly asks the Court to be mindful that it must presume the constitutionality

---

[4] The Commonwealth also contends that the only application at issue is the conflict with the Virginia Health Care Freedom Act. The Court, however, need not specifically reach this issue.

of federal legislation. *Gibbs v. Babbitt,* 214 F.3d 483, 490 (4th Cir. 2000). Third, she reminds the Court that the task at hand is not to independently review the facts underlying the decision of Congress to exercise its Article I authority to enact legislation. Reviewing courts are confined to a determination of whether a rational basis exists for such congressional action. *See Gonzales v. Raich,* 545 U.S. 1, 22, 125 S. Ct. 2195, 2208 (2005).

II.

In this Court's Memorandum Opinion denying the Defendant's Motion to Dismiss, the Court recognized that the Secretary's application of the Commerce Clause and General Welfare Clause appeared to extend beyond existing constitutional precedent. It was also noted that each side had advanced some authority arguably supporting the theory underlying their position. Accordingly, the Court was unable to conclude at that stage that the Complaint failed to state a cause of action. At this point, the analysis proceeds to the next level. To prevail, the Commonwealth, as Plaintiff, must make "a plain showing that Congress has exceeded its constitutional bounds." *Gibbs,* 214 F.3d at 490 (internal citation omitted). To win summary judgment, the Secretary must convince the Court to the contrary.

Under Federal Rule of Civil Procedure 56(c)(2), summary judgment should be granted "if the

pleadings, the discovery and disclosure materials on file, and any affidavits show that there is no genuine issue as to any material fact and that the movant is entitled to judgment as a matter of law." *News & Observer Publ'g Co. v. Raleigh-Durham Airport Auth.*, 597 F.3d 570, 576 (4th Cir. 2010) (quoting Fed. R. Civ. P. 56(c)(2)). "The moving party is 'entitled to judgment as a matter of law' when the nonmoving party fails to make an adequate showing on an essential element for which it has the burden of proof at trial." *News & Observer Publ'g Co.*, 597 F.3d at 576; *see Cleveland v. Policy Mgmt. Sys. Corp.*, 526 U.S. 795, 805-06, 119 S. Ct. 1597, 1603 (1999). Aside from sparring over representations of marginal consequence, there do not appear to be any material facts genuinely at issue. This case turns solely on issues of law. Both parties acknowledge that resolution by summary judgment is appropriate.

III.

Turning to the merits, this Court previously noted that the Minimum Essential Coverage Provision appears to forge new ground and extends the Commerce Clause powers beyond its current high water mark. The Court also acknowledged the finite well of jurisprudential guidance in surveying the boundaries of such power. The historically-accepted contours of Article I Commerce Clause power were restated by the Supreme Court in *Perez v. United States*, 402 U.S. 146, 150, 91 S. Ct. 1357, 1359 (1971). The *Perez* Court divided traditional Commerce Clause

powers into three distinct strands. First, Congress can regulate the channels of interstate commerce. *Id.* Second, Congress has the authority to regulate and protect the instrumentalities of interstate commerce and persons or things in interstate commerce. *Id.* Third, Congress has the power to regulate activities that substantially affect interstate commerce. *Id.* It appears from the tenor of the debate in this case that only the third category of Commerce Clause power is presently at issue.

Critical to the Secretary's argument is the notion that an individual's decision not to purchase health insurance is in effect "economic activity." (Def.'s Mem. Supp. 35.) The Secretary rejects the Commonwealth's implied premise that a person can simply elect to avoid participation in the health care market. It is inevitable, in her view, that every individual – today or in the future – healthy or otherwise – will require medical care. She adds that a large segment of the population is uninsured and "consume[s] tens of billions of dollars in uncompensated care each year." (Def.'s Mem. Opp. 14.) The Secretary maintains that the irrefutable facts demonstrate that "[t]he conduct of the uninsured – their economic decision as to how to finance their health care needs, their actual use of the health care system, their migration in and out of coverage, and their shifting of costs on to the rest of the system when they cannot pay – plainly is economic activity." (Def.'s Mem. Opp. 16-17.)

The Secretary relies on what is commonly referred to as an aggregation theory, which is

conceptually based on the hypothesis that the sum of individual decisions to participate or not in the health insurance market has a critical collective effect on interstate commerce. Congress may regulate even intrastate activities if they are within a class of activities that, in the aggregate, substantially affect interstate commerce. In support of this argument, the Secretary relies on the teachings of the Supreme Court in *Gonzales,* wherein the Court noted that "[w]hen Congress decides that the 'total incidence' of a practice poses a threat to a national market, it may regulate the entire class." *Gonzales,* 545 U.S. at 17, 125 S. Ct. at 2205-06 (citing *Perez,* 402 U.S. at 154, 91 S. Ct. at 1361). In other words, her argument is premised on the theoretical effect of an aggregation or critical mass of indecision on interstate commerce.

The core of the Secretary's primary argument under the Commerce Clause is that the Minimum Essential Coverage Provision is a necessary measure to ensure the success of its larger reforms of the interstate health insurance market.[5] The Secretary emphasizes that the ACA is a vital step in transforming a currently dysfunctional interstate health insurance market. In the Secretary's view, the key elements of health care reform are coverage of those with preexisting conditions and prevention of discriminatory premiums on the basis of medical

---

[5] The Secretary seems to sidestep the independent freestanding constitutional basis for the Provision.

history. These features, the Secretary maintains, will have a material effect on the health insurance underwriting process, and inevitably, the cost of insurance coverage. Therefore, without full market participation, the financial foundation supporting the health care system will fail, in effect causing the entire health care regime to "implode." Unless everyone is required by law to purchase health insurance, or pay a penalty, the revenue base will be insufficient to underwrite the costs of insuring individuals presently considered as high risk or uninsurable. Therefore, under the Secretary's reasoning, since Congress has the power under the Commerce Clause to reform the interstate health insurance market, it also possesses, under the Necessary and Proper Clause, the power to make the regulation effective by enacting the Minimum Essential Coverage Provision. *United States v. Wrightwood Dairy Co.,* 315 U.S. 110, 118-19, 62 S. Ct. 523, 525-26 (1942).

The Secretary seeks legal support for her aggregation theory in the Supreme Court's holding in *Wickard v. Filburn,* 317 U.S. 111, 63 S. Ct. 82 (1942) and *Gonzales.* She maintains that the central question is whether there is a rational basis for concluding that the class of activities at issue, when "taken in the aggregate," substantially affects interstate commerce. *Gonzales,* 545 U.S. at 22, 125 S. Ct. at 2208; *Wickard,* 317 U.S. at 127-28. In other words, "[w]here the class of activities is regulated and that class is within reach of federal power, the courts

have no power 'to excise, as trivial, individual instances' of the class." *Gonzales,* 545 U.S. at 23, 125 S. Ct. at 2209 (quoting *Perez,* 402 U.S. at 154, 91 S. Ct. at 1361); *United States v. Malloy,* 568 F.3d 166, 180 (4th Cir. 2009), *cert. denied,* 130 S. Ct. 1736 (2010).

In *Wickard,* the Supreme Court upheld the power of Congress to regulate the personal cultivation and consumption of wheat on a private farm. The Court reasoned that the consumption of such non-commercially produced wheat reduced the amount of commercially produced wheat purchased and consumed nationally, thereby affecting interstate commerce. *Wickard* is generally acknowledged to be the most expansive application of the Commerce Clause by the Supreme Court, followed by *Gonzales.*

At issue in *Gonzales* was whether the aggregate effect of personal growth and consumption of marijuana for medicinal purposes under California law had a sufficient impact on interstate commerce to warrant regulation under the Commerce Clause. The Supreme Court concluded that "Mike the farmer in *Wickard,* respondents are cultivating, for home consumption, a fungible commodity for which there is an established, albeit illegal, interstate market. . . . Here too, Congress had a rational basis for concluding that leaving home-consumed marijuana outside federal control would similarly affect price and market conditions." *Gonzales,* 545 U.S. at 18-19, 125 S. Ct. at 2206-07.

The Secretary emphasizes that the Commonwealth's challenge fails to appreciate the significance of the overall regulatory scheme and program at issue. Quoting from *Gonzales,* the Secretary notes that when "a general regulatory statute bears a substantial relation to commerce, the *de minimis* character of individual instances arising under the statute is of no consequence." (Def.'s Mem. Supp. 19 (quoting *Gonzales,* 545 U.S. at 17, 125 S. Ct. at 2206).) Furthermore, the Secretary adds that "[f]or the provisions of '[a] complex regulatory program' to fall within [Congress's] commerce power, '[i]t is enough that the challenged provisions are an integral part of the regulatory program and that the regulatory scheme when considered as a whole satisfies this test.'" (Def.'s Mem. Opp. 9 (quoting *Gibbs,* 214 F.3d at 497).)

When reviewing congressional exercise of the Commerce Clause powers, the Secretary cautions that a court "need not itself measure the impact on interstate commerce of the activities Congress sought to regulate, nor need the court calculate how integral a particular provision is to a larger regulatory program. The court's task instead is limited to determining 'whether a rational basis exists' for Congress's conclusions."[6] (Def.'s Mem. Supp. 19

---

[6] In response to footnote 1 in the Court's Memorandum Opinion denying Defendant's Motion to Dismiss, the Secretary addresses the effect of the McCarran-Ferguson Act on the power of Congress to regulate the business of insurance under the

(Continued on following page)

(quoting *Gonzales*, 545 U.S. at 22, 125 S. Ct. at 2208).)

Because the Minimum Essential Coverage Provision is the linchpin which provides financial viability to the other critical elements of the overall regulatory scheme, the Secretary concludes that its adoption is within congressional Commerce Clause powers. She emphasizes that Congress "rationally found that a failure to regulate the decision to delay or forego insurance – i.e., the decision to shift one's costs on to the larger health care system – would undermine the 'comprehensive regulatory regime.'" (Def.'s Mem. Supp. 27 (quoting *Gonzales*, 545 U.S. at

---

Commerce Clause. The Act expressly declared that the regulation and taxation of the business of insurance, and all who engage in it, should be subject to the laws of the several states unless Congress specifically states the contrary. 15 U.S.C. § 1012. *Life Partners, Inc. v. Morrison*, 484 F.3d 284, 292 (4th Cir. 2007) *cert. denied*, 552 U.S. 1062 (2007).

The Secretary points out that where Congress exercises that power, its enactment controls over any contrary state law. *Humana, Inc. v. Forsyth*, 525 U.S. 299, 306, 119 S. Ct. 710, 716 (1999). Specifically, the Secretary maintains that the ACA reforms the insurance industry by preventing insurers from denying or revoking coverage for those with preexisting conditions and by protecting individuals with such conditions from being charged discriminatory rates. These provisions, which are effectuated by the Minimum Essential Coverage Provision, in the Secretary's view, regulate the business of insurance.

The Commonwealth counters, however, that an individual's decision not to purchase insurance is not within the logical ambit of the business of insurance.

27, 125 S. Ct. at 2211).) Therefore, the Secretary posits that because the guaranteed coverage and rate discrimination issues are unquestionably within the Commerce Clause powers, the mechanism chosen by Congress to effectuate those reforms, the Minimum Essential Coverage Provision, is also a proper exercise of that power – either under the Commerce Clause or the associated Necessary and Proper Clause.

IV.

The Secretary characterizes the Minimum Essential Coverage Provision as the vital kinetic link that animates Congress's overall regulatory reform of interstate health care and insurance markets. "[T]he Necessary and Proper Clause makes clear that the Constitution's grants of specific federal legislative authority are accompanied by broad power to enact laws that are 'convenient, or useful' or 'conducive' to the authority's 'beneficial exercise.'" *United States v. Comstock*, 130 S. Ct. 1949, 1956 (2010) (quoting *McCulloch v. Maryland*, 17 U.S. (4 Wheat.) 316, 408 (1819). The Secretary maintains that because Congress has rationally concluded "that the minimum coverage provision is necessary to make the other regulations in the Act effective," it is an appropriate exercise of the Necessary and Proper Clause. (Def.'s Mem. Supp. 29.) Again, the Secretary contends that the determination of whether the means adopted to attain its legislative goals are rationally related is reserved for Congress alone.

Burroughs v. United States, 290 U.S. 534, 547-48, 54 S. Ct. 287, 291 (1934).

Although the Necessary and Proper Clause vests Congress with broad authority to exercise means, which are not themselves an enumerated power, to implement legislation, it is not without limitation. As the Secretary concedes, the means adopted must not only be rationally related to the implementation of a constitutionally-enumerated power, but it must not violate an independent constitutional prohibition. *Comstock,* 130 S. Ct. at 1956-57. Whether the Minimum Essential Coverage Provision, which requires an individual to purchase health insurance or pay a penalty, is borne of a constitutionally-enumerated power, is the core issue in this case. As the Supreme Court noted in *Buckley v. Valeo*, "Congress has plenary authority in all areas in which it has substantive legislative jurisdiction, . . . so long as the exercise of that authority does not offend some other constitutional restriction." 424 U.S. 1, 132, 96 S. Ct. 612, 688 (1976) (internal citation omitted). The Commonwealth argues that the Provision offends a fundamental restriction on Commerce Clause powers.

In their opposition, the Commonwealth focuses on what it perceives to be the central element of Commerce Clause jurisdiction – economic activity. The Commonwealth distinguishes what was deemed to be "economic activity" in *Wickard* and *Gonzales,* namely a voluntary decision to grow wheat or cultivate marijuana, from the involuntary act of

purchasing health insurance as required by the Provision. In *Wickard* and *Gonzales,* individuals made a conscious decision to grow wheat or cultivate marijuana, and consequently, voluntarily placed themselves within the stream of interstate commerce. Conversely, the Commonwealth maintains that the Minimum Essential Coverage Provision compels an unwilling person to perform an involuntary act and, as a result, submit to Commerce Clause regulation.

Drawing on the logic articulated in *United States v. Lopez,* 514 U.S. 549, 115 S. Ct. 1624 (1995) and *United States v. Morrison,* 529 U.S. 598, 120 S. Ct. 1740 (2000), which limited the boundaries of Commerce Clause jurisdiction to activities truly economic in nature and that actually affect interstate commerce, the Commonwealth contends that a decision not to purchase a product, such as health insurance, is not an economic *activity.* In *Morrison,* the Court noted that "[e]ven [our] modern-era precedents which have expanded congressional power under the Commerce Clause confirm that this power is subject to outer limits." *Morrison,* 529 U.S. at 608, 120 S. Ct. at 1748-49. The Court in *Morrison* also pointed out that "the existence of congressional findings is not sufficient, by itself, to sustain the constitutionality of Commerce Clause legislation." *Id* at 614, 120 S. Ct. at 1752. Finally, in *Morrison,* the Court rejected "the argument that Congress may regulate noneconomic, violent criminal conduct based solely on the conduct's aggregate effect on interstate

commerce." *Id.* at 617, 120 S. Ct. at 1754. The Commonwealth urges a similar analysis in this case.

The Commonwealth does not appear to challenge the aggregate effect of the many moving parts of the ACA on interstate commerce. Its lens is narrowly focused on the enforcement mechanism to which it is hinged, the Minimum Essential Coverage Provision.

The Commonwealth argues that the Necessary and Proper Clause cannot be employed as a vehicle to enforce an unconstitutional exercise of Commerce Clause power, no matter how well intended. Although the Necessary and Proper Clause grants Congress broad authority to pass laws in furtherance of its constitutionally-enumerated powers, its authority is not unbridled. As Chief Justice John Marshall observed in *McCulloch,* "[l]et the end be legitimate, let it be within the scope of the constitution, and all means which are appropriate, which are plainly adapted to that end, which are not prohibited, but consistent with the letter and spirit of the constitution, are constitutional." *McCulloch,* 17 U.S. (4 Wheat.) at 421.

More recently, in restating the limitations on the scope of the Necessary and Proper Clause, the Supreme Court defined the relevant inquiry, "we look to see whether the statute constitutes a means that is rationally related to the implementation of a constitutionally enumerated power." *Comstock,* 130 S. Ct. at 1956. If a person's decision not to purchase health insurance at a particular point in time does

not constitute the type of economic activity subject to regulation under the Commerce Clause, then logically an attempt to enforce such provision under the Necessary and Proper Clause is equally offensive to the Constitution.

The Secretary, in rebuttal, faults the Commonwealth's reasoning as overly simplistic. She argues that the Commonwealth's theory is dependent on which method a person chooses to finance their inevitable health care expenditures. If the costs are underwritten by an insurance carrier, it is activity; if the general public pays by default, it is passivity. She maintains that under the Commonwealth's reasoning, the former is subject to Commerce Clause powers, while the latter is not. The Secretary also points out that under the Commonwealth's approach, "it [is] unclear whether an individual became 'passive,' and therefore supposedly beyond the reach of the commerce power, if he dropped his policy yesterday, a week ago, or a year ago." (Def.'s Mem. Opp. 18.) She characterizes the Commonwealth's logic as untenable.

The Secretary also rejects the notion that the imposition of a monetary penalty for failing to perform an act is outside the spirit of the Constitution. She offers two examples to highlight the point. In the context of Superfund regulation, a property owner cannot avoid liability for allowing contamination on his property by claiming that he was only "passive." Mere ownership of contaminated property under the Superfund Act triggers an obligation to undertake remedial measures. *Nurad,*

Inc. v. Wm. E. Hooper & Sons Co., 966 F.2d 837, 845 (4th Cir. 1992). Moreover, a property owner cannot defeat an action to take a parcel of his land under the power of eminent domain, simply by passively taking no action. *Berman v. Parker*, 348 U.S. 26, 33, 75 S. Ct. 98, 103 (1954).

In addition, the Secretary points out that sanctions have historically been imposed for failure to timely file tax returns or truthfully report or pay taxes due, as well as failure to register for the selective service or report for military duty. The Commonwealth, however, counters that most of the examples presented are directly related to a specific constitutional provision – empowering Congress to assess taxes and to provide and maintain an Army and Navy, U.S. Const. art. I, § 8, or requiring compensation for exercising the power of eminent domain. U.S. Const. amend. V. In the case of the landowner sanctioned for contamination of his property, liability largely stemmed from an active transaction of purchase. In contrast, no specifically articulated constitutional authority exists to mandate the purchase of health insurance.

V.

Despite the laudable intentions of Congress in enacting a comprehensive and transformative health care regime, the legislative process must still operate within constitutional bounds. Salutatory goals and creative drafting have never been sufficient to offset

an absence of enumerated powers. As the Supreme Court noted in *Morrison*, "[e]ven [our] modern-era of precedents which have expanded congressional power under the Commerce Clause confirm that this power is subject to outer limits." *Morrison,* 529 U.S. at 608, 120 S. Ct. at 1748-49 (quoting *Lopez,* 514 U.S. at 556-57, 115 S. Ct. at 1628). Congressional findings, no matter how extensive, are insufficient to enlarge the Commerce Clause powers of Congress. *Morrison,* 529 U.S. at 614, 120 S. Ct. at 1752.

In *Wickard* and *Gonzales,* the Supreme Court staked out the outer boundaries of Commerce Clause power. In both cases, the activity under review was the product of a self-directed affirmative move to cultivate and consume wheat or marijuana. This self-initialed change of position voluntarily placed the subject within the stream of commerce. Absent that step, governmental regulation could have been avoided.

In *Morrison* and *Lopez,* however, the Supreme Court tightened the reins and insisted that the perimeters of legislation enacted under Commerce Clause powers square with the historically-accepted contours of Article I authority delineated by the Supreme Court in *Perez v. United States,* 402 U.S. 146, 91 S. Ct. 1357 (1971). Pertinent to the immediate case, the Court in *Perez* stated that Congress has the power to regulate *activities* that substantially affect interstate commerce. *Id.* at 150, 91 S. Ct. at 1359. In *Perez,* the Court upheld a federal prohibition on extortionate credit transactions, even though the

specific transaction in question had not occurred in interstate commerce.

The Court in *Lopez* and *Morrison* constrained the boundaries of Commerce Clause jurisdiction to activities truly economic in nature and that had a demonstrable effect on interstate commerce. In *Lopez,* the Court found that the Gun-Free School Zones Act, which made it a federal offense for any individual knowingly to possess a firearm in a school zone, exceeded Congress's Commerce Clause authority. First, the Court held that the statute by its terms had nothing to do with commerce or any sort of economic enterprise. Second, it concluded that the act could not be sustained "under our cases upholding regulations of activities that arise out of or are connected with a commercial transaction, which viewed in the aggregate, substantially affects interstate commerce." *Lopez,* 514 U.S. at 561, 115 S. Ct. at 1631.

Later in *Morrison,* the Court concluded that the Commerce Clause did not provide Congress with the authority to impose civil remedies under the Violence Against Women Act. Despite extensive factual findings regarding the serious impact that gender-motivated violence has on victims and their families, the Court concluded that it was insufficient by itself to sustain the constitutionality of Commerce Clause legislation. *Morrison,* 529 U.S. at 614, 120 S. Ct. at 1752. The Court in *Morrison* ultimately rejected the argument that Congress may regulate noneconomic, violent criminal conduct based solely on

that conduct's aggregated effect on interstate commerce. *Id.* at 617, 120 S. Ct. at 1754.

In surveying the legal landscape, several operative elements are commonly encountered in Commerce Clause decisions. First, to survive a constitutional challenge the subject matter must be economic in nature and affect interstate commerce, and second, it must involve activity. Every application of Commerce Clause power found to be constitutionally sound by the Supreme Court involved some form of action, transaction, or deed placed in motion by an individual or legal entity. The constitutional viability of the Minimum Essential Coverage Provision in this case turns on whether or not a person's decision to refuse to purchase health care insurance is such an activity.

In her argument, the Secretary urges an expansive interpretation of the concept of activity. She posits that every individual in the United States will require health care at some point in their lifetime, if not today, perhaps next week or even next year. Her theory further postulates that because near universal participation is critical to the underwriting process, the collective effect of refusal to purchase health insurance affects the national market. Therefore, she argues, requiring advance purchase of insurance based upon a future contingency is an activity that will inevitably affect interstate commerce. Of course, the same reasoning could apply to transportation, housing, or nutritional decisions. This broad definition of the economic activity subject

to congressional regulation lacks logical limitation and is unsupported by Commerce Clause jurisprudence.

The power of Congress to regulate a class of activities that in the aggregate has a substantial and direct effect on interstate commerce is well settled. *Gonzales,* 545 U.S. at 22, 125 S. Ct. at 2209. This even extends to noneconomic activity closely connected to the intended market. *Hoffman v. Hunt,* 126 F.3d 575, 587-88 (4th Cir. 1997). But these regulatory powers are triggered by some type of self-initiated action. Neither the Supreme Court nor any federal circuit court of appeals has extended Commerce Clause powers to compel an individual to involuntarily enter the stream of commerce by purchasing a commodity in the private market.[7] In doing so, enactment of the Minimum Essential Coverage Provision exceeds the Commerce Clause powers vested in Congress under Article I.

Because an individual's personal decision to purchase – or decline to purchase – health insurance from a private provider is beyond the historical reach of the Commerce Clause, the Necessary and Proper Clause does not provide a safe sanctuary. This clause grants Congress broad authority to pass laws in furtherance of its constitutionally-enumerated powers. This authority may only be constitutionally

---

[7] The collective effect of an aggregate of such inactivity still falls short of the constitutional mark.

deployed when tethered to a lawful exercise of an enumerated power. *See Comstock,* 130 S. Ct. at 1956-57. As Chief Justice Marshall noted in *McCulloch,* it must be within "the letter and spirit of the constitution." 17 U.S. (4 Wheat.) at 421. The Minimum Essential Coverage Provision is neither within the letter nor the spirit of the Constitution. Therefore, the Necessary and Proper Clause may not be employed to implement this affirmative duty to engage in private commerce.

VI.

On an alternative front, the Secretary contends that the Minimum Essential Coverage Provision is a valid exercise of Congress's independent taxation power under the General Welfare Clause in Article 1.[8] Despite pre-enactment representations to the contrary by the Executive and Legislative branches, the Secretary now argues that the Minimum Essential Coverage Provision is, in essence, a "tax penalty." The Secretary notes that the Provision is codified in the Internal Revenue Code and the penalty, if applicable, is reported and paid as a part of an individual's annual tax return.

Because the Provision is purportedly a product of congressional power of taxation, judicial review is

---

[8] "The Congress shall have Power To lay and collect Taxes, Duties, Imposts and Excises, to pay the Debts and provide for the . . . general Welfare." U.S. Const. art. I, § 8, cl. 1.

generally narrow and limited. *United States v. Ptasynski,* 462 U.S. 74, 84, 103 S. Ct. 2239, 2245 (1983). Relying on *United States v. Aiken,* 974 F.2d 446 (4th Cir. 1992), the Secretary asserts that the power of Congress to lay and collect taxes, duties, and excises under Article I, Section 8 of the U.S. Constitution, requires only that it be a revenue raising measure and that the associated regulatory provisions bear a "reasonable relation" to the statute's taxing power. *Id.* at 448; *see also Sonzinsky v. United States,* 300 U.S. 506, 513, 57 S. Ct. 554, 555-56 (1937) (involving whether a levy on the sale of firearms described as a tax and passed by Congress's taxing power was in fact a tax). According to the Secretary, the power of Congress to tax for the general welfare is checked only by the electorate. "Unless there are provisions, extraneous to any tax need, courts are without authority to limit the exercise of the taxing power." *United States v. Kahrigher,* 345 U.S. 22, 31, 73 S. Ct. 510, 515 (1953), *overruled on other grounds, Marchetti v. United States,* 390 U.S. 39, 88 S. Ct. 697 (1968).

The Secretary also reiterates that Congress may use its power under the tax clause even for purposes that would exceed its power under other provisions of Article I. *United States v. Sanchez,* 340 U.S. 42, 44, 71 S. Ct. 108, 110 (1950). As an example, the Secretary highlights the assessment of estate taxes. Congress has the authority to impose inheritance taxes but lacks power under the Commerce Clause to regulate the administration of estates.

The Secretary takes issue with the Commonwealth's contention that the Minimum Essential Coverage Provision is a penalty, rather than a tax, and that there is a legal distinction between the two. "In passing on the constitutionality of a tax law [the court is] 'concerned only with its practical operation, not its definition or the precise form of descriptive words which may be applied to it.'" *Nelson v. Sears, Roebuck & Co.*, 312 U.S. 359, 363, 61 S. Ct. 586, 588 (1941) (internal citation omitted).

Initially she points out that the Provision has all the historic attributes of a tax. First and foremost, the Provision generates revenue forecast to be approximately $4 billion annually to be paid into the general treasury. She argues that this falls squarely within the classic definition of a tax, namely, "a . . . burden, laid upon individuals or property for the purpose of supporting the Government." *United States v. Reorganized CF&I Fabricators of Utah, Inc.*, 518 U.S. 213, 224, 116 S. Ct. 2016, 2113 (1996) (quoting *New Jersey v. Anderson*, 203 U.S. 483, 492, 27 S. Ct. 137, 140 (1906)).[9] The income threshold for the penalty to apply under the Minimum Essential Coverage Provision is based on the statutory level requiring individuals to file income tax returns and is calculated by reference to the individual's household

---

[9] A penalty, on the other hand, imports the notion of a punishment for an unlawful act or omission. *Reorganized CF&I Fabricators of Utah, Inc.*, 518 U.S. at 224, 116 S. Ct. at 2113.

income for the given year. If the penalty applies, the taxpayer reports it on his return for that year. The penalty becomes an additional income tax liability. 26 U.S.C. § 5000A(b)(2). The Secretary therefore maintains that Congress treated the Minimum Essential Coverage Provision as an exercise of its taxing power in addition to its commerce power.

The Secretary also dismisses the Commonwealth's contention that the Provision is a penalty as opposed to a tax. She concedes that the Provision has a regulatory purpose, but adds that "[e]very tax is in some measure regulatory" to the extent "it interposes an economic impediment to the activity taxed as compared with others not taxed." *Sonzinsky,* 300 U.S. at 513, 57 S. Ct. at 555. She also emphasizes that courts have abandoned the antiquated distinction between revenue raising taxes and regulatory penalties. *Bob Jones Univ. v. Simon,* 416 U.S. 725, 741 n.12, 94 S. Ct. 2038, 2048 (1974). Although Section 1501 variously employs the terms "tax" and "penalties," "the labels used do not determine the extent of the taxing power." *Simmons v. United States,* 308 F.2d 160, 166 n.21 (4th Cir. 1962).

Furthermore, despite the Commonwealth's insistence to the contrary, the Secretary argues that courts have upheld the exercise of congressional taxing power even when its regulatory intent or purpose extends beyond its Commerce Clause authority. "From the beginning of our government the courts have sustained taxes although imposed

with the collateral intent of effecting ulterior ends which, considered apart, were beyond the constitutional power of the lawmakers to realize by legislation directly addressed to their accomplishment." *Sanchez,* 340 U.S. at 45, 71 S. Ct. at 110. The Commonwealth's analysis is further flawed, in her view, because their foundational bedrock of supporting authority consists of long discarded criminal as opposed to regulatory cases. The Minimum Essential Coverage Provision does not impose a criminal punishment.

Therefore, the Secretary maintains that because the Minimum Essential Coverage Provision in fact generates revenue and its regulatory features are rationally related to the goal of requiring every individual to pay for the medical services they receive, which is within the ambit of Commerce Clause powers, the Provision must be upheld.

The Commonwealth urges the Court to reject the Secretary's simplistic analysis that casts aside a wealth of historical tax clause jurisprudence. The Commonwealth does not dispute that the principles it relies upon as controlling have been rarely deployed in recent years, but the scope of congressional power under review is without modern counterpart. The Commonwealth also disagrees that the penalty provision in question meets the classic characteristics of a tax – or was intended by Congress to be a tax. The text of Section 1501 unequivocally states that it is a product of the Commerce Clause, not the General Welfare Clause. Moreover, any revenue generated is

merely incidental to a violation of a regulatory provision.

Irrespective of labels, the Commonwealth contends that the federal government is seeking to smuggle an unconstitutional exercise of the Commerce Clause past judicial review in the guise of a tax. In the Commonwealth's view, this legislative tactic offends the letter and spirit of the Constitution. "[T]he law is that Congress can tax under its taxing power that which it can't regulate, but it can't regulate through taxation that which it cannot otherwise regulate." (Tr. 81:18-21, July 1, 2010 (*citing Bailey v. Drexel Furniture Co.* (*Child Labor Tax Case*), 259 U.S. 20, 37, 42 S. Ct. 449, 450 (1922))); *see United States v. Butler,* 297 U.S. 1, 68, 56 S. Ct. 312, 320 (1936); *Linder v. United States,* 268 U.S. 5, 17, 45 S. Ct. 446, 448-49 (1925). "[A] 'purported tax' that is actually a penalty to force compliance with a regulatory scheme must be tied to an enumerated power other than the taxing power." (Pl.'s Reply Mem. 11, ECF No. 117.)

The Attorney General of Virginia specifically asks the Court to closely examine the viability of the Secretary's core premise that the terms "tax" and "penalty" are legally synonymous and interchangeable. The Commonwealth maintains that the mainstay of the Secretary's taxation argument founders on the shoals of this faulty assumption. This notion of interchangeable is apparently derived from a footnote in *Bob Jones University*

> It is true that the Court [in earlier cases] drew what it saw at the time as distinctions between regulatory and revenue-raising taxes. But the Court has subsequently abandoned such distinctions. Even if such distinctions have merit, it would not assist petitioner [in this case], since its challenge is aimed at the imposition of federal income, FICA, and FUTA taxes which are clearly intended to raise revenue.

Bob Jones Univ., 416 U.S. at 741 n.12, 94 S. Ct. at 2048 n.12 (internal citations omitted).

The Secretary argues that this cursory footnote disarms the precedential impact of an entire body of constitutional law governing regulatory penalties. In the Commonwealth's view, the Secretary has misconstrued the import and precedential effect of this footnote, which should be accorded no more dignity than dicta. To support this contention, the Commonwealth directs the Court's attention to a contrary position articulated by the Supreme Court in *United States v. La Franca*. "The two words [tax versus penalty] are not interchangeable . . . and if an exaction [is] clearly a penalty it cannot be converted into a tax by the simple expedient of calling it such." *United States v. La Franca*, 282 U.S. 568, 572, 51 S. Ct. 278, 280 (1931); *see also Reorganized CF&I*

Fabricators of Utah, Inc., 518 U.S. at 224, 116 S. Ct. at 2112.[10]

The Attorney General of Virginia maintains that the distinction between a tax and a penalty may be subtle, but is nonetheless significant. He adds that the power of Congress to exact a penalty is more constrained than its taxing authority under the General Welfare Clause because it must be in aid of an enumerated power. *Sunshine Anthracite Coal Co. v. Adkins,* 310 U.S. 381, 393, 60 S. Ct. 907, 912 (1940); *United States v. Butler,* 297 U.S. 1, 61, 56 S. Ct. 312, 317 (1936).

Despite the Secretary's characterization of such cases as superannuated, the Commonwealth hastens to reply that they have never been overruled by the U.S. Supreme Court. In fact, the Commonwealth points out that the holding in the *Child Labor Tax Case* was restated with approval by the Supreme Court in 1994 in *Department of Revenue of Montana v. Kurth Ranch,* 511 U.S. 767, 114 S. Ct. 1937 (1994). "Yet we have also recognized that 'there comes a time in the extension of the penalizing features of the so-called tax when it loses its character as such and becomes a mere penalty with the characteristics of regulation and punishment.'" *Id.* at 779, 114 S. Ct. at

---

[10] In rejoinder, the Secretary notes that the term "penalty" defined and discussed in *Reorganized CF&I Fabricators of Utah, Inc.* referred to a payment as a penalty for an unlawful act, not a noncompliance sanction, as here.

1946 (*citing Child Labor Tax Case,* 259 U.S. at 38). The Commonwealth argues that this is such a case.

The Commonwealth also discounts the significance of Congress's use of the term "tax" in the ACA and the placement of the Minimum Essential Coverage Provision in the Internal Revenue Code. "No inference, implication, or presumption of legislative construction shall be drawn or made by reason of the location or grouping of any particular section or provision of this title. . . ." 26 U.S.C. § 7806(b).

The Commonwealth emphasizes that the best evidence of congressional intent is the language chosen by that legislative body. In the Minimum Essential Coverage Provision (26 U.S.C. § 5000A(b)(1)) Congress specifically denominated this payment for failure to comply with the mandate as a "penalty." "Because the PPACA penalty is an exaction for an omission – one that if it operated perfectly would produce no revenue – it is a penalty as a matter of law. . . ." (Pl.'s Mem. Opp. Mot. Summ. J. 28, ECF No. 95.)

During oral argument on the Secretary's Motion to Dismiss, the Deputy Assistant Attorney General of the United States informed the Court that because the Provision in fact generated revenue, and its regulatory features were rationally related to the goal of requiring every individual to pay for the medical services they receive, "that's the end of the ballgame." (Tr. 44:11, July 1, 2010.) The Commonwealth

maintains that the question of whether a provision is a penalty or tax is a question of law for the Court to resolve, relying on *Reorganized CF&I Fabricators of Utah, Inc.*, 518 U.S. at 224-26, 116 S. Ct. 2113-14 and *La Franca*, 282 U.S. at 572, 51 S. Ct. at 280.

Because the noncompliance penalty provision in Section 1501 lacks a bona fide intention to raise revenue for the general welfare, the Commonwealth argues that it does not meet the historical criteria for a tax. Furthermore, the resulting regulatory tax, untethered to an enumerated power, is an unconstitutional encroachment on the state's power of regulation under the Tenth Amendment. *See Butler*, 297 U.S. at 68, 56 S. Ct. at 320; *Child Labor Tax Case*, 259 U.S. at 37-38, 42 S. Ct. at 451. While the Provision may have the incidental effect of raising revenue, the Commonwealth maintains that its clear intended purpose is to exercise prohibited police power to compel individuals to enter into private commercial transactions.

VII.

The Minimum Essential Coverage Provision reads in pertinent part: "[i]f a taxpayer who is an applicable individual . . . fails to meet the requirement of subsection (a) [mandatory insurance coverage] . . . there is hereby imposed on the taxpayer a penalty. . . ." 26 U.S.C. § 5000A(b)(1). Although purportedly grounded in the General Welfare Clause, the notion that the generation of revenue was a

significant legislative objective is a transparent afterthought. The legislative purpose underlying this provision was purely regulation of what Congress misperceived to be economic activity. The only revenue generated under the Provision is incidental to a citizen's failure to obey the law by requiring the minimum level of insurance coverage. The resulting revenue is "extraneous to any tax need." *See Kahriger,* 345 U.S. at 31, 73 S. Ct. at 515.[11] The use of the term "tax" appears to be a tactic to achieve enlarged regulatory license.

Compelling evidence of the intent of Congress can be found in the Act itself. In the preface to Section 1501, Congress specifically recites the constitutional basis for its actions and includes requisite findings of fact. "The individual . . . [mandate] is commercial and economic in nature, and substantially affects interstate commerce. . . ." 42 U.S.C. § 18091(a)(1). The Secretary is correct that "[i]t is beyond serious question that a tax does not cease to be valid merely because it regulates, discourages, or even definitely deters the activities taxed. The principle applies even though the revenue obtained is obviously negligible, or the revenue purpose of the tax may be secondary." *Sanchez,* 340

---

[11] In *Florida ex rel. McCollum,* 716 F. Supp. 2d at 1137-38, Judge Vinson perceptively notes that the Provision fails to mention any revenue generating purposes, characteristic of most tax clause enactments. *See Rosenberger v. Rector & Visitors of Univ. of Va.,* 515 U.S. 819, 841, 115 S. Ct. 2510, 2522 (1995).

U.S. at 44, 71 S. Ct. at 110 (internal citations omitted). The sources cited by the Secretary to support this proposition, however, are readily distinguishable from the immediate case. Unlike the mandate at hand, in *Sanchez* and *Sonzinsky,* the enactment in question purported on its face to be an exercise of the taxing power.

In concluding that Congress did not intend to exercise its powers of taxation under the General Welfare Clause, this Court's analysis begins with the unequivocal denials by the Executive and Legislative branches that the ACA was a tax. In drafting this provision, Congress specifically referred to the exaction as a penalty. "[T]here is hereby imposed on the taxpayer a penalty . . . " 26 U.S.C. § 5000A(b)(1). Earlier versions of the bill in both the House of Representatives and the Senate used the more politically toxic term "tax" when referring to the assessment for noncompliance with the insurance mandate. *See* America's Affordable Health Choices Act of 2009, H.R. 3200, 111th Cong. (2009); Affordable Health Care for America Act, H.R. 3962, 111th Cong. (2009); and America's Healthy Future Act, S. 1796, 111th Cong. (2009). Each of these earlier versions specifically employed the word "tax" as opposed to "penalty" as the sanction for noncompliance.

In the final version of the ACA enacted by the Senate on December 24, 2009, the term "penalty" was substituted for "tax" in Section 1501(b)(1). A logical inference can be drawn that the substitution of this critical language was a conscious and deliberate act

on the part of Congress. *See Russello v. United States,* 464 U.S. 16, 23-24, 104 S. Ct. 296, 300-301 (1983); *Bonner v. City of Prichard,* 661 F.2d 1206, 1207 (11th Cir. 1981) (en banc). This shift in terminology during the final hours preceding an extremely close floor vote undermines the contention that the terms "penalty" and "tax" are synonymous.[12]

It is also significant to note that unlike the term "penalty" used in Section 1501(b)(1), other sections of the ACA specifically employ the word "tax." Section 9009 imposes a tax on the sale of any taxable medical device by the manufacturer, producer, or importer. Section 9001 imposes a tax on high-cost, employer-sponsored health care coverage. Section 9015 imposes a tax on certain high-income taxpayers. Finally, Section 10907 imposes a tax on any indoor tanning service. The legislature's apparent careful choice of words supports the conclusion that the term "tax" was not used indiscriminately. As the Supreme Court observed in *Duncan v. Walker*, "it is well settled that '[w]here Congress includes particular language in one section of a statute but omits it in another section of the same Act, it is generally presumed that Congress acts intentionally and purposely in the disparate inclusion or exclusion.' 533 U.S. 167, 173, 121 S. Ct. 2120, 2125 (2001) (internal citations omitted).

---

[12] The Secretary's use of the newly-coined expression "tax penalty" adds little to the debate.

This Court is also not persuaded that the placement of the Minimum Essential Coverage Provision in the Internal Revenue Code under "miscellaneous excise taxes" has the significance claimed by the Secretary. The Internal Revenue Code itself clearly states that such placement does not give rise to any inference or presumption that the exaction was intended to be a tax. *See* 26 U.S.C. § 7806(b). Given the anomalous nature of this Provision, it is equally plausible that Congress simply docked the Provision in a convenient harbor.

This Court is therefore unpersuaded that Section 1501(b)(1) is a bona fide revenue raising measure enacted under the taxing power of Congress. As the Supreme Court pointed out in *La Franca*, "[t]he two words [tax vs. penalty] are not interchangeable . . . and if an exaction [is] clearly a penalty, it cannot be converted into a tax by the simple expedient of calling it such." *La Franca,* 282 U.S. at 572, 515 S. Ct. at 280. The penalizing feature of this so-called tax has clearly "los[t] its character as such" and has become "a mere penalty with the characteristics of regulation and punishment." *Kurth Ranch,* 511 U.S. at 799, 114 S. Ct. at 1946 (citing *Child Labor Tax Case,* 259 U.S. at 28, 42 S. Ct. at 451). No plausible argument can be made that it has "the purpose of supporting the Government." *Reorganized CF&I Fabricators of Utah, Inc.,* 518 U.S. at 224, 116 S. Ct. at 2113 (quoting *New Jersey v. Anderson,* 203 U.S. 483, 492, 27 S. Ct. 137, 140 (1906)).

Having concluded that Section 1501(b)(1) is, in form and substance, a penalty as opposed to a tax,[13] it must be linked to an enumerated power other than the General Welfare Clause. *See Sunshine Anthracite Coal Co.*, 310 U.S. at 393, 60 S. Ct. at 912; *Butler*, 297 U.S. at 61, 56 S. Ct. at 317; *Child Labor Tax Case*, 259 U.S. at 38, 42 S. Ct. at 451. Notwithstanding criticism by the pen of some constitutional scholars, the constraining principles articulated in this line of cases, while perhaps dormant, remains viable and applicable to the immediate dispute. Although they have not been frequently employed in recent years, this absence appears to be more a product of the unprecedented nature of the legislation under review than an abandonment of established principles.

It is clear from the text of Section 1501 that the underlying regulatory scheme was conceived as an exercise of Commerce Clause powers. This is supported by specific factual findings purporting to demonstrate the effect of the health care scheme on interstate commerce. In order for the noncompliance penalty component to survive constitutional challenge, it must serve to effectuate a valid exercise of an enumerated power – here

---

[13] If allowed to stand as a tax, the Minimum Essential Coverage Provision would be the only tax in U.S. history to be levied directly on individuals for their failure to affirmatively engage in activity mandated by the government not specifically delineated in the Constitution.

the Commerce Clause. *Sunshine Anthracite Coal Co.*, 310 U.S. at 393, 60 S. Ct. at 912.

Earlier in this opinion, the Court concluded that Congress lacked power under the Commerce Clause, or associated Necessary and Proper Clause, to compel an individual to involuntarily engage in a private commercial transaction, as contemplated by the Minimum Essential Coverage Provision. The absence of a constitutionally viable exercise of this enumerated power is fatal to the accompanying sanction for noncompliance. The Deputy Assistant Attorney General of the United States intimated as much during oral argument on the Defendant's Motion to Dismiss, "if it is unconstitutional, then the penalty would fail as well." (Tr. 21:10-11, July 1, 2010.)

A thorough survey of pertinent constitutional case law has yielded no reported decisions from any federal appellate courts extending the Commerce Clause or General Welfare Clause to encompass regulation of a person's decision not to purchase a product, notwithstanding its effect on interstate commerce or role in a global regulatory scheme. The unchecked expansion of congressional power to the limits suggested by the Minimum Essential Coverage Provision would invite unbridled exercise of federal police powers. At its core, this dispute is not simply about regulating the business of insurance – or crafting a scheme of universal health insurance coverage – it's about an individual's right to choose to participate.

Article I, Section 8 of the Constitution confers upon Congress only discrete enumerated governmental powers. The powers not delegated to the United States by the Constitution, nor prohibited by it to the States, are reserved to the states respectively, or to the people. *See* U.S. Const. amend. X; *Printz v. United States,* 521 U.S. 898, 919, 117 S. Ct. 2365, 2376-77 (1997).

On careful review, this Court must conclude that Section 1501 of the Patient Protection and Affordable Care Act – specifically the Minimum Essential Coverage Provision – exceeds the constitutional boundaries of congressional power.

VIII.

Having found a portion of the Act to be invalid, the Section 1501 requirement to maintain minimum essential health care coverage, the Court's next task is to determine whether this Section is severable from the balance of the enactment. Predictably, the Secretary counsels severability, and the Commonwealth urges wholesale invalidation. The Commonwealth's position flows in part from the Secretary's frequent contention that Section 1501 is the linchpin of the entire health care regimen underlying the ACA. However, the bill embraces far more than health care reform. It is laden with provisions and riders patently extraneous to health care – over 400 in all.

The most recent guidance on the permissible scope of severance is found in *Free Enterprise Fund v. Public Co. Accounting Oversight Board,* 130 S. Ct. 3138 (2010). "Generally speaking, when confronting a constitutional flaw in a statute, we try to limit the solution to the problem, severing any 'problematic portions while leaving the remainder intact.'" *Id.* at 3161 (quoting *Ayotte v. Planned Parenthood of N. New England,* 546 U.S. 320, 328-29, 126 S. Ct. 961, 967 (2006)). Because "[t]he unconstitutionality of a part of an act does not necessarily defeat or affect the validity of its remaining provisions," *Champlin Refining Co. v. Corp. Comm'n of Okla.,* 286 U.S. 210, 234, 52 S. Ct. 559, 565 (1932), "the 'normal rule' is 'that partial, rather than facial, invalidation is the required course.'" *Free Enter. Fund,* 130 S. Ct. at 3161 (quoting *Brockett v. Spokane Arcades, Inc.,* 472 U.S. 491, 504, 105 S. Ct. 2794, 2802 (1985)).

The teachings of *Free Enterprise* are a direct descendent of the rule restated in *Alaska Airlines, Inc. v. Brock,* 480 U.S. 678, 107 S. Ct. 1476 (1987). "The standard for determining the severability of an unconstitutional provision is well established: '[u]nless it is evident that the Legislature would not have enacted those provisions which are within its power, independently of that which is not, the invalid part may be dropped if what is left is fully operative as a law.'" *Id.* at 684, 107 S. Ct. at 1480 (quoting *Buckley v. Valeo,* 424 U.S. 1, 108, 96 S. Ct. 612, 677 (1976)).

In applying this standard, the Court must also consider whether the balance of the statute will function in a manner consistent with the intent of Congress in the wake of severance of the unconstitutional provision. *Alaska Airlines,* 480 U.S. at 685, 107 S. Ct. at 1480. Finally, in evaluating severability, the Court must determine whether in the absence of the severed unconstitutional provision, Congress would have enacted the statute. *Id.* at 685, 107 S. Ct. at 1480. Given the vagaries of the legislative process, "this inquiry can sometimes be 'elusive.'" *Free Enter. Fund,* 130 S. Ct. at 3161 (quoting *I.N.S. v. Chadha,* 462 U.S. 919, 932, 103 S. Ct. 2764, 2774 (1983)).

The final element of the analysis is difficult to apply in this case given the haste with which the final version of the 2,700 page bill was rushed to the floor for a Christmas Eve vote. It would be virtually impossible within the present record to determine whether Congress would have passed this bill, encompassing a wide variety of topics related and unrelated to heath care, without Section 1501. Even then, the Court's conclusions would be speculative at best. Moreover, without the benefit of extensive expert testimony and significant supplementation of the record, this Court cannot determine what, if any, portion of the bill would not be able to survive independently.

Therefore, this Court will hew closely to the time-honored rule to sever with circumspection, severing any "problematic portions while leaving the

remainder intact." *Ayotte*, 546 U.S. at 329, 126 S. Ct. at 967. Accordingly, the Court will sever only Section 1501 and directly-dependent provisions which make specific reference to Section 1501.[14]

IX.

The final issue for resolution is the Commonwealth's request for injunctive relief enjoining implementation of Section 1501 – at least until a higher court acts. In reviewing this request, the Commonwealth urges this Court to employ the traditional requirements for injunctive relief articulated in *Monsanto Co. v. Geerston Seed Farms*, 130 S. Ct. 2743, 2756 (2010). This case, however, turns on atypical and uncharted applications of constitutional law interwoven with subtle political undercurrents. The outcome of this case has significant public policy implications. And the final word will undoubtedly reside with a higher court.

Aside from scant guiding precedent on the central issues, there are no compelling exigencies in this case. The key provisions of Section 1501 – the only aspect of the ACA squarely before this Court – do not take effect until 2013 at the earliest. Therefore,

---

[14] A court's ability to rewrite legislation is severely constrained and best left to the legislature. "[S]uch editorial freedom . . . belongs to the Legislature, not the Judiciary. Congress of course remains free to pursue any of these options [to amend legislation] going forward." *Free Enter. Fund*, 130 S. Ct. at 3162.

the likelihood of any irreparable harm pending certain appellate review is somewhat minimal. Although the timely implementation of Section 1501 might require each side to take some initial preparatory steps in the ensuing months, none are irreversible.

Historically, federal district courts have been reluctant to invoke the extraordinary remedy of injunctive relief against federal officers where a declaratory judgment is adequate. "[W]e have long presumed that officials of the Executive Branch will adhere to the law as declared by the court. As a result, the declaratory judgment is the functional equivalent of an injunction." *Comm. on the Judiciary of the United States House of Representatives v. Miers*, 542 F.3d 909, 911 (D.C. Cir. 2008); *see also Smith v. Reagan*, 844 F.2d 195, 200 (4th Cir. 1988); *Sanchez-Espinoza v. Regan*, 770 F.2d 202, 208 n.8 (D.C. Cir. 1985). The Commonwealth appears to concede that if the Secretary is duty-bound to honor this Court's declaratory judgment, there is no need for injunctive relief. (Pl.'s Reply Mem. 19.) In this Court's view, the award of declaratory judgment is sufficient to stay the hand of the Executive branch pending appellate review.

X.

In the final analysis, the Court will grant Plaintiffs Motion for Summary Judgment and deny Defendant's similar motion. The Court will sever

Section 1501 from the balance of the ACA and deny Plaintiffs request for injunctive relief.

An appropriate Order will accompany this Memorandum Opinion.

/s/ Henry Hudson
Henry E. Hudson
United States District Judge

Date: Dec. 13, 2010
Richmond, VA

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF VIRGINIA
Richmond Division

COMMONWEALTH OF VIRGINIA EX REL. KENNETH T. CUCCINELLI, II, in his official capacity as Attorney General of Virginia, Plaintiff, v. KATHLEEN SEBELIUS, SECRETARY OF THE DEPARTMENT OF HEALTH AND HUMAN SERVICES, in her official capacity, Defendant.	)	Civil Action No. 3:10CV188-HEH

ORDER

(Granting Plaintiff's Motion for Summary Judgment and Denying Defendant's Motion for Summary Judgment)

(Filed Dec. 13, 2010)

THIS MATTER is before the Court on Motions for Summary Judgment filed by both parties (Dk. Nos. 88, 90) on September 3, 2010, pursuant to Federal Rule of Civil Procedure 56. For the reasons stated in the accompanying Memorandum Opinion, Plaintiff's Motion is GRANTED as to its request for declaratory relief and DENIED as to its request for injunctive relief, and Defendant's Motion is DENIED.

The Clerk is directed to send a copy of this Order and the accompanying Memorandum Opinion to all counsel of record.

It is SO ORDERED.

/s/ Henry Hudson
Henry E. Hudson
United States District Judge

Date: Dec. 13, 2010
Richmond, VA

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF VIRGINIA
Richmond Division

COMMONWEALTH OF VIRGINIA EX REL. KENNETH T. CUCCINELLI, II, in his official capacity as Attorney General of Virginia, Plaintiff,	)	
v.	)	Civil Action No. 3:10CV188-HEH
KATHLEEN SEBELIUS, SECRETARY OF THE DEPARTMENT OF HEALTH AND HUMAN SERVICES, in her official capacity, Defendant.	)	

MEMORANDUM OPINION
(Defendant's Motion to Dismiss)

(Filed Aug. 2, 2010)

This is a narrowly-tailored facial challenge to the constitutionality of Section 1501 of the Patient Protection and Affordable Care Act, Pub. L. No. 111-148, 124 Stat. 119 (2010). This provision, in essence, requires individuals to either obtain a minimum level of health insurance coverage or pay a penalty for failing to do so. According to the Complaint, which seeks declaratory and injunctive relief, the enactment of Section 1501 not only exceeds the power of Congress under the Commerce Clause

and General Welfare Clause of the United States Constitution, but is also directly at tension with Virginia Code Section 38.2-3430.1:1 (2010), commonly referred to as the Virginia Health Care Freedom Act.

The case is presently before the Court on Defendant's Motion to Dismiss, filed pursuant to Federal Rules of Civil Procedure 12(b)(1) and (b)(6). Both sides have filed extensive and thoroughly researched memoranda supporting their respective positions. The Court heard oral argument on July 1, 2010. Although this case is laden with public policy implications and has a distinctive political undercurrent, at this stage the sole issues before the Court are subject matter jurisdiction and the legal sufficiency of the Complaint.

I.

In the Complaint, the Commonwealth of Virginia (the "Commonwealth") assails Section 1501 (or "Minimum Essential Coverage Provision") on a number of fronts. First, the Commonwealth contends that requiring an otherwise unwilling individual to purchase a good or service from a private vendor is beyond the outer limits of the Commerce Clause. In the Commonwealth's view, the failure – or refusal – of its citizens to elect to purchase health insurance is not "economic activity" and therefore not subject to federal regulation under the Commerce Clause. Succinctly put, the Commonwealth defies the Secretary to point to any Commerce Clause

jurisprudence extending its tentacles to an individual's decision not to engage in economic activity. Furthermore, they argue that since Section 1501 exceeds this enumerated power, Congress cannot invoke either the Necessary and Proper Clause or its taxation powers to regulate such passive economic inactivity.

Alternatively, the Commonwealth maintains that Section 1501 is in direct conflict with the Virginia Health Care Freedom Act. The Commonwealth argues that the enactment of Section 1501 therefore encroaches on the sovereignty of the Commonwealth and offends the Tenth Amendment to the Constitution.

The Defendant in this case is Kathleen Sebelius, in her official capacity as Secretary of the Department of Health and Human Services (the "Secretary"). The Secretary's Motion to Dismiss, filed under both Fed. R. Civ. P. 12(b)(1) and (b)(6), has several distinct strands. The Secretary argues initially that the Attorney General of Virginia, in his official capacity, lacks standing to challenge Section 1501, thereby depriving this Court of subject matter jurisdiction. Because the mandatory insurance provision is not effective until 2014, the Secretary also maintains that the issues are not ripe for immediate resolution.

With respect to the merits, the Secretary contends that the Complaint lacks legal vitality and therefore fails to state a cause of action. She asserts

that the Minimum Essential Coverage Provision is amply supported by time-honored applications of Congress's Commerce Clause powers and associated regulatory authority under the Necessary and Proper Clause. The theoretical foundation for the Secretary's position is predicated on factual findings by Congress that Section 1501 is the central ingredient of a complex health care regulatory scheme. Its core underpinning is the notion that every individual will need medical services at some point. Everyone, voluntarily or otherwise, is therefore either a current or future participant in the health care market.

To underwrite this health care scheme and guarantee affordable coverage to every individual, the cost of providing these services must be defrayed from some source, particularly as to the individuals who are uninsured. To address the annual deficit caused by uncompensated medical services, which according to the Secretary is approximately $43 billion, Congress included the penalty provision in Section 1501 to coax all individuals to purchase insurance. Because Section 1501, like the Act as a whole, regulates decisions about how to pay for services in the health care market and the insurance industry, the Secretary reasons that it necessarily affects interstate commerce.

Lastly, the Secretary contends that Section 1501 is a valid exercise of Congress's independent authority to use its taxing and spending power under the General Welfare Clause. Therefore, she argues that this action is barred by the Anti-Injunction Act.

II.

Turning first to the standing issue, relying on *Massachusetts v. Mellon,* 262 U.S. 447, 43 S. Ct. 597 (1923), the Secretary argues that the Attorney General's prosecution of this case, on behalf of the citizens of the Commonwealth of Virginia, is barred by the long-standing doctrine of "*parens patriae*." *Id.* at 485, 43 S. Ct. at 600. In *Mellon,* the U.S. Supreme Court noted that because citizens of an individual state are also citizens of the United States, "[i]t cannot be conceded that a State, as parens patriae, may institute judicial proceedings to protect citizens of the United States from the operation of the statutes thereof." *Id.* The Court further stated in *Mellon* that "it is no part of [a State's] duty or power to enforce [its citizens'] rights in respect of their relations with the federal government." *Id.* at 485-86, 43 S. Ct. at 600. Therefore, the Secretary contends that a state does not have standing as *parens patriae* to bring an action against the federal government. *Id.*; *see Alfred L. Snapp & Son, Inc. v. Puerto Rico ex rel. Barez,* 458 U.S. 592, 610 n.16, 102 S. Ct. 3260, 3270 (1982).

The Secretary further maintains that the congressional enactment at issue, Section 1501, imposes no obligation on the Commonwealth as a sovereign. The Secretary marginalizes the conflict between Section 1501 and the Virginia Health Care Freedom Act as a political policy dispute manufactured for the sole purpose of creating standing. The resulting abstract policy dispute causes

no imminent injury to the sovereign and is thus insufficient to support standing to challenge a federal enactment. *Mellon,* 262 U.S. at 484-85, 43 S. Ct. at 600.

On the other hand, the Commonwealth views the task at hand differently. In prosecuting the immediate action, the Commonwealth, through its Attorney General, is not simply representing individual citizens, it is defending the constitutionality and enforceability of its duly enacted laws. The Commonwealth maintains that its standing to defend its legislative enactments is a fossilized principle uniformly recognized by the U.S. Supreme Court, citing *Diamond v. Charles,* 476 U.S. 54 (1986).

> "[T]he power to create and enforce a legal code, both civil and criminal" is one of the quintessential functions of a State. *Alfred L. Snapp & Son, Inc. v. Puerto Rico ex rel. Barez,* 458 U.S. 592, 601, 102 S. Ct. 3260, 3265-66, 73 L. Ed. 2d 995 (1982). Because the State alone is entitled to create a legal code, only the State has the kind of "direct stake" identified in *Sierra Club v. Morton,* 405 U.S. [727,] 740, 92 S. Ct. [1361,] 1369 [(1972)], in defending the standards embodied in that code.

Diamond, 476 U.S. at 65, 106 S. Ct. at 1705.

The Commonwealth draws a clear distinction between this case and those relied upon by the Secretary. The Commonwealth argues that it is not prosecuting this case in a *parens patriae,* or

quasi-sovereign capacity. In the immediate case, the Commonwealth is exercising a core sovereign power because the effect of the federal enactment is to require Virginia to yield under the Supremacy Clause. Unlike *Mellon*, irrespective of its underlying legislative intent, the Virginia statute is directly in conflict with Section 1501 of the Patient Protection and Affordable Care Act.[1]

A subsidiary element of the Secretary's argument that this Court lacks subject matter jurisdiction is the alleged absence of any imminent injury to sovereign interest. The Commonwealth counters that the conflict between federal and state law is "immediate and complete with respect to the legal principles at issue." (Pl.'s Mem. Opp'n Mot. Dismiss 4.) By way of

---

[1] In 1945, Congress passed the McCarran-Ferguson Act, 15 U.S.C. § 1011, *et seq.*, in reaction to the U.S. Supreme Court's decision in *United States v. South-Eastern Underwriters Ass'n*, 322 U.S. 533, 64 S. Ct. 1162 (1944). The Act expressly declared that the continued regulation and taxation of the business of insurance, and all who engage in it, should be subject to the laws of the several states unless Congress specifically states the contrary. *Life Partners, Inc. v. Morrison*, 484 F.3d 284, 292 (4th Cir. 2007), *cert. denied*, 2007 U.S. Lexis 12349 (Dec. 3, 2007); *see also Prudential Ins. Co. v. Benjamin*, 328 U.S. 408, 430, 66 S. Ct. 1142, 1155 (1946). The Secretary argues that the language of Section 1501 is sufficient to imply an intent on the part of Congress to in effect preempt any state regulation to the contrary. The Commonwealth appears to disagree. (Tr. 48-49, July 1, 2010.) The demarcation between state and federal responsibility in this area will require further development in future proceedings in order to adequately address the Commonwealth's Tenth Amendment argument.

further elucidation, the Commonwealth contends that it has already begun taking steps to prepare for the implementation of the Patient Protection and Affordable Care Act. It asserts that "officials are presently having to deviate from their ordinary duties to begin the administrative response to the changes in federal law as they cascade through the Medicaid and insurance regulatory systems." (Pl.'s Mem. Opp'n Mot. Dismiss 4.)

The next facet of the Secretary's challenge to the Court's subject matter jurisdiction in this case invokes the Anti-Injunction Act, 26 U.S.C. § 7421(a).[2] The Anti-Injunction Act provides, in pertinent part, that "no suit for the purpose of restraining the assessment or collection of any tax shall be maintained in any court by any person, whether or not such person is the person against whom such tax was assessed." 26 U.S.C. § 7421(a). The Secretary argues that the restraining effect of this Act is broad enough to include payments which are labeled a

---

[2] By implication, this argument would also include parallel provisions in the Declaratory Judgment Act, 28 U.S.C. § 2201(a). "Though the Anti-Injunction Act concerns federal courts' subject matter jurisdiction and the tax-exclusion provision of the Declaratory Judgment Act concerns the issuance of a particular remedy, the two statutory texts are, in underlying intent and practical effect, coextensive." *In re Leckie Smokeless Coal Co.*, 99 F.3d 573, 583 (4th Cir. 1996). "In light of the two provisions' coextensive nature, a finding that one of the two statutes does not bar the debtors in the instant cases from seeking and obtaining free and clear orders will necessitate a finding that the other statute does not pose an obstacle either." *Id.* at 584.

"penalty rather than a tax," as the Secretary styles the assessment in this case for failure to purchase the requisite insurance coverage. (Def.'s Mem. Supp. Mot. Dismiss 16.) Because the Secretary maintains that the immediate action constitutes an abatement of a tax liability or penalty, she claims the District Court lacks jurisdiction. The Secretary's position is that the only appropriate relief vehicle for a citizen seeking to challenge the penalty provisions of Section 1501 would be to pay the required penalty and sue for a refund. *See Bob Jones Univ. v. Simon,* 416 U.S. 725, 736, 94 S. Ct. 2038, 2046 (1974).

The Commonwealth urges a more narrow interpretation of the Anti-Injunction Act. The Commonwealth contends that the word "person" used in the operative portion of the Anti-Injunction Act does not include a state. The U.S. Supreme Court, as well as the Fourth Circuit, has almost uniformly held that the word "person" appearing in a federal statute should not be interpreted as including a state. There is a "longstanding interpretive presumption that 'person' does not include the sovereign." *Vt. Agency of Natural Res. v. United States ex rel. Stevens,* 529 U.S. 765, 780, 120 S. Ct. 1858, 1866 (2000); *see also Va. Office for Prot. & Advocacy v. Reinhard,* 405 F.3d 185, 189 (4th Cir. 2005). "The presumption is, of course, not a hard and fast rule of exclusion, but it may be disregarded only upon some affirmative showing of statutory intent to the contrary." *Vt. Agency of Natural Res.,* 529 U.S. at 781, 120 S. Ct. at 1867 (internal citations omitted). The Commonwealth

argues that the Secretary has failed to overcome the requisite presumption because she cannot point to any persuasive authority that the Anti-Injunction Act applies to states. Therefore, the Commonwealth argues that the Anti-Injunction Act does not apply to its prosecution of this case.

Alternatively, the Commonwealth contends that the claims advanced in this case fall squarely within an exception to the Anti-Injunction Act recognized in *South Carolina v. Regan*, 465 U.S. 367, 104 S. Ct. 1107 (1984). In *Regan*, the Supreme Court observed that the Anti-Injunction Act was not intended to bar "actions brought by aggrieved parties for whom [Congress] has not provided an alternative remedy." *Id.* at 378, 104 S. Ct. at 1114. Because the Commonwealth contends that only the sovereign has standing to seek judicial vindication of its own statutes, it claims the effect of the Anti-Injunction Act would be to deny the Commonwealth a remedy to address the effect of the federal enactment at issue.

Although the Commonwealth's contention that the term "person" in the Anti-Injunction Act does not apply to states may be well-founded, this Court believes it is clear that the *Regan* exception applies in this case.[3] As the Supreme Court held in *Regan*, the

---

[3] This Court can also not ignore the fact that the Commonwealth's Complaint does not challenge the penalty provision of the Patient Protection and Affordable Care Act, though the two undeniably act in tandem. Instead, the

(Continued on following page)

Anti-Injunction Act "was intended to apply only when Congress has provided an alternative avenue for an aggrieved party to litigate its claims on its own behalf." *Id.* at 381, 104 S. Ct. at 1115; *see also In re Leckie Smokeless Coal Co.*, 99 F.3d at 584. Additionally, the *Regan* Court emphasized that, "the indicia of congressional intent – the [Anti-Injunction] Act's purposes and the circumstances of its enactment – demonstrate that Congress did not intend the Act to apply where an aggrieved party would be required to depend on the mere possibility of persuading a third party to assert his claims." *Regan*, 465 U.S. at 381, 104 S. Ct. at 1115. However, "[b]ecause of the strong policy animating the Anti-Injunction Act, and the sympathetic, almost unique, facts in *Regan*, courts have construed the *Regan* exception very narrowly. . . ." *Judicial Watch, Inc. v. Rossotti*, 317 F.3d 401, 408 n.3 (4th Cir. 2003).

Despite this narrow interpretation, this Court finds the justification for allowing an exception to the Anti-Injunction Act in *Regan* applies with equal strength to the circumstances in this case. First, the Supreme Court found that "instances in which a third party may raise the constitutional rights of another are the exception rather than the rule." *Regan*, 465 U.S. at 380, 104 S. Ct. at 1115 (citing *Singleton v. Wulff*, 428 U.S. 106, 114, 96 S. Ct. 2868, 2874 (1976)).

Complaint exclusively attacks the constitutionality of the mandate to purchase health care insurance.

Thus, in this case, without standing to defend the constitutionality of a state's right to create and enforce its own legal code, an individual taxpayer would be unable to assert the constitutional rights of the Commonwealth. Second, "to make use of this remedy the State 'must first be able to find [an individual] willing to subject himself to the rigors of litigation against the Service, and then must rely on [him] to present the relevant arguments on [its] behalf.'" *Id.* (citing *Bob Jones,* 416 U.S. at 747 n.21, 94 S. Ct. at 2051). Due to the magnitude, cost, and *sui generis* interest of Virginia in this case, even if standing was not an issue, it appears the Commonwealth would be hard-pressed to find a suitable party to argue the case on its behalf.

Third, and perhaps most importantly, "[b]ecause it is by no means certain that the State would be able to convince a taxpayer to raise its claims, reliance on the remedy suggested by the Secretary would create the risk that the Anti-Injunction Act would entirely deprive the State of any opportunity to obtain review of its claims." *Id.* at 380-81, 104 S. Ct. at 1115. Applying this logic to the Commonwealth, as a sovereign entity not required to purchase insurance under Section 1501, Virginia will never be assessed the fine imposed under the Patient Protection and Affordable Care Act, and consequently, never afforded an opportunity to pay the penalty and request a refund. Therefore, this Court concludes that "[b]ecause Congress did not prescribe an alternative

remedy for the plaintiff in this case, the Act does not bar this suit." *Id.* at 381, 104 S. Ct. at 1115-16.

Although this lawsuit has the collateral effect of protecting the individual interests of the citizens of the Commonwealth of Virginia, its primary articulated objective is to defend the Virginia Health Care Freedom Act from the conflicting effect of an allegedly unconstitutional federal law. Despite its declaratory nature, it is a lawfully-enacted part of the laws of Virginia. The purported transparent legislative intent underlying its enactment is irrelevant. The mere existence of the lawfully-enacted statute is sufficient to trigger the duty of the Attorney General of Virginia to defend the law and the associated sovereign power to enact it.[4] As the U.S. Supreme Court noted in *Alfred L. Snapp & Son, Inc.*, it is common ground that states have an interest as sovereigns in exercising "the power to create and enforce a legal code." *Alfred L. Snapp & Son, Inc.*, 458 U.S. at 601, 102 S. Ct. at 3265. With few exceptions, courts have uniformly held that individuals do not have standing to bring a Tenth Amendment claim. *Kennedy v. Allera*, ___ F.3d ___, 2010 WL 2780188, at *8 (4th Cir. July 15, 2010) (citing *Brooklyn Legal*

---

[4] Federal courts have long recognized the duty of state Attorneys General to defend the laws of their states. *See* Fed. R. Civ. P. 5.1(a)(2) (requiring that any party challenging the constitutionality of a state statute serve notice on the state Attorney General).

Servs. Corp. B v. Legal Servs. Corp., 462 F.3d 219, 234-36 (2d Cir. 2006)).

The power of the Attorney General to prosecute claims on behalf of the state he or she represents remains unsettled despite centuries of legal debate.[5] This is particularly true in cases involving suits against the federal government. *See Alaska v. U.S. Dep't of Transp.*, 868 F.2d 441, 443 n.1 (D.C. Cir. 1989). Reviewing courts, in their standing analysis, have distinguished cases where the individual interests of citizens are purely at stake from those in which the interest of the state, as a separate body politic, is implicated. The former is distinguished by legal commentators from the latter as quasi-sovereignty as opposed to sovereignty. While standing jurisprudence in the area of quasi-sovereign or *parens patriae* standing defies simple formulation, courts have uniformly held that "where a harm is widely shared, a sovereign, suing in its individual interest, has standing to sue where that sovereign's individual interests are harmed, wholly apart from the alleged general harm." *Ctr. for Biological Diversity v. U.S. Dep't of Interior*, 563 F.3d 466, 476-77

---

[5] Given the stake states have in protecting their sovereign interests, they are often accorded "special solicitude" in standing analysis. *Massachusetts v. EPA*, 549 U.S. 497, 520, 127 S. Ct. 1438, 1455 (2007).

(D.C. Cir. 2009) (citing *Massachusetts v. EPA*, 549 U.S. 497, 127 S. Ct. 1438 (2007)).[6]

Closely analogous to the immediate case is *Wyoming ex rel. Crank v. United States*, 539 F.3d 1236 (10th Cir. 2008). There the State of Wyoming sought declaratory and injunctive relief against a decision of the United States Bureau of Alcohol, Tobacco, Firearms and Explosives, which determined that a Wyoming statute purportedly establishing a procedure to expunge domestic violence misdemeanor convictions, in order to restore lost firearms rights, would not have the intended effect under federal law. As in the immediate case, the United States challenged the Article III standing of the State of Wyoming to seek judicial relief from the conflicting federal regulation. The Tenth Circuit held that Wyoming's stake in the controversy was sufficiently adverse to warrant Article III standing.

Relying on the teachings of *Alfred L. Snapp & Son, Inc.*, the Tenth Circuit observed that the states have a legally protected sovereign interest in "the exercise of sovereign power over individuals and entities within the relevant jurisdiction[, which]

---

[6] Of course, Article III standing has other elements. A plaintiff must demonstrate: (i) an injury-in-fact that is both concrete and particularized, as well as actual or imminent; (ii) an injury that is traceable to the conduct complained of; and (iii) an injury that is redressable by a decision of the court. *Lujan v. Defenders of Wildlife*, 504 U.S. 555, 560-61, 112 S. Ct. 2130, 2136 (1992).

involves the power to create and enforce a legal code." *Wyoming*, 539 F.3d at 1242 (quoting *Alfred L. Snapp & Son, Inc.*, 458 U.S. at 601, 102 S. Ct. at 3265). "Federal regulatory action that preempts state law creates a sufficient injury-in-fact to satisfy this prong. Accordingly, we conclude that Wyoming has sufficiently alleged an injury-in-fact. . . ." *Id.* at 1242 (internal citations omitted).

This Court finds the Tenth Circuit's standing analysis in *Wyoming* to be sound and adopts its principled and logical reasoning in this case. The Commonwealth, through its Attorney General, satisfies Article III's standing requirements under the facts of this case.

III.

Resolution of the standing issue resolves only a single strand of the case or controversy requirements of Article III subject matter jurisdiction. The matter must also be ripe for adjudication. In other words, the claim must be sufficiently mature and issues sufficiently defined and concrete to create an actual justiciable controversy. *See Blanchette v. Conn. Gen. Ins. Corps. (Reg'l Rail Reorganization Act Cases)*, 419 U.S. 102, 138-39, 95 S. Ct. 335, 356 (1974). "[R]ipeness is peculiarly a question of timing. . . ." *Id.* at 140, 95 S. Ct. at 357. It implicates both constitutional limitations and prudential consideration. *Reno v. Catholic Soc. Servs. Inc.*, 509 U.S. 43, 57 n.18, 1135 S. Ct. 2485, 2496 (1993). In

determining whether a claim is ripe for judicial review, courts evaluate "'the fitness of the issues for judicial decision' and 'the hardship of withholding court consideration.'" *Stolt-Nielsen S.A. v. AnimalFeeds Int'l Corp.*, 130 S. Ct. 1758, 1767 n.2 (2010) (quoting *Nat'l Park Hospitality Ass'n v. Dep't of Interior*, 538 U.S. 805, 808, 123 S. Ct. 2026, 2031 (2003)). "The burden of proving ripeness falls on the party bringing suit." *Miller v. Brown*, 462 F.3d 312, 319 (4th Cir. 2006).

This element of the Secretary's argument is closely intertwined with her contention that Virginia has not demonstrated that it will suffer a hardship from the provision it challenges because the Minimum Essential Coverage Provision does not go into effect until 2014. This lack of immediate impact, in her view, renders the Commonwealth's challenge premature. To support this contention, the Secretary relies principally on *South Carolina v. Katzenbach*, 383 U.S. 301, 86 S. Ct. 803 (1966). *Katzenbach* involved a suit to enjoin enforcement of certain provisions of the Voting Rights Act of 1965, particularly those sections providing civil and criminal sanctions against interference with the exercise of rights guaranteed by the Act. The *Katzenbach* Court found those sections of the statute imposing criminal penalties to be premature for constitutional review, but held that the regulatory portions were ripe for judicial consideration.

It is important to note that the Supreme Court has historically drawn a distinction between the

ripeness analysis employed for criminal statutes as opposed to other regulatory enactments. *Reg'l Rail Reorganization Act Cases,* 419 U.S. at 143 n.29, 95 S. Ct. at 358. Unlike a regulatory statute, the decision to initiate criminal prosecutions resides within the discretion of prosecutors – and allows for citizens to voluntarily bring their conduct within the bounds of the law. *Id.* The Minimum Essential Coverage Provision presently before the Court lacks criminal remedies. In fact, it specifically waives criminal prosecution or sanctions for failure to pay a penalty levied by the Act. 26 U.S.C. § 5000A(g)(2)(A). Therefore, neither prosecutorial discretion nor self-regulated citizen conduct considerations are present here. With certain delineated exceptions, 26 U.S.C. § 5000A(a) mandates that a citizen purchase, or otherwise obtain insurance, or face a monetary assessment. The central issue in this case is the Commonwealth's sovereign interest in upholding the Virginia Health Care Freedom Act. The issues presented are purely legal and further development of the factual record would not clarify the issues for judicial resolution. *Thomas v. Union Carbide Agric. Prods. Co.,* 473 U.S. 568, 581, 105 S. Ct. 3325, 3333 (1985).

While the mandatory compliance provisions of the Minimum Essential Coverage Provision do not go into effect until 2014, that does not mean that its effects will not be felt by the Commonwealth in the near future. This provision will compel scores of people who are not currently enrolled to evaluate and

contract for insurance coverage. Individuals currently insured will be required to be sure that their present plans comply with this regulatory regimen. Insurance carriers will have to take steps in the near future to accommodate the influx of new enrollees to public and private insurance plans. Employers will need to determine if their current insurance satisfies the statutory requirements.

More importantly, the Commonwealth must revamp its health care program to ensure compliance with the enactment's provisions, particularly with respect to Medicaid. This process will entail more than simple fine tuning. Unquestionably, this regulation radically changes the landscape of health insurance coverage in America.

The Supreme Court, and the preponderance of reviewing courts of appeals, have not been reticent to consider the constitutionality of legislative enactments prior to their date of effectiveness when the resulting alleged injury is impending and more than a "mere possibility." *See Pierce v. Soc'y of Sisters*, 268 U.S. 510, 45 S. Ct. 571 (1925) (ruling a year prior to the challenged law's date of effectiveness was permissible); *see also Virginia v. Am. Booksellers Ass'n.*, 484 U.S. 383, 392-93, 108 S. Ct. 636, 642-43 (1988) (upholding a pre-enforcement challenge to a state law on First Amendment grounds). Again, the alleged injury in this case is the collision between state and federal law. Neither the White House nor Congress has given any indication that the Minimum Essential Coverage Provision at issue will not be

enforced, and the Court sees no reason to assume otherwise. *Am. Booksellers Ass'n.*, 484 U.S. at 393, 108 S. Ct. at 643. Nor do the facts before the Court here present a "hypothetical" case, *United States v. Raines*, 362 U.S. 17, 22, 80 S. Ct. 519, 523 (1960), or a "remote and abstract . . . inquiry." *Int'l Longshoremen's Union, Local 37 v. Boyd*, 347 U.S. 222, 224, 74 S. Ct. 447, 448 (1954).

The issues in this case are fully framed, the underlying facts are well settled, and the case is accordingly ripe for review. The Commonwealth has therefore satisfied all requirements of Article III standing.

IV.

Turning to the merits of the Complaint, it is important to keep in mind that the Court's mission at this stage is narrow. To survive a Rule 12(b)(6) challenge, a complaint need only state a legally viable cause of action. "A motion to dismiss under Rule 12(b)(6) tests the sufficiency of a complaint; importantly, it does not resolve contests surrounding the facts, the merits of a claim, or the applicability of defenses." *Republican Party of N.C. v. Martin*, 980 F.2d 943, 952 (4th Cir. 1992), *cert. denied*, 510 U.S. 828, 114 S. Ct. 93 (1993). In reviewing a 12(b)(6) motion, the complaint must be construed in the light most favorable to the plaintiff, assuming its factual allegations to be true. *Hishon v. King & Spalding*, 467 U.S. 69, 73, 104 S. Ct. 2229, 2232 (1984).

This time-honored standard is a bit more difficult to apply in the context of this case. The congressional enactment under review – the Minimum Essential Coverage Provision – literally forges new ground and extends Commerce Clause powers beyond its current high watermark. Counsel for both sides have thoroughly mined relevant case law and offered well reasoned analyses. The result, however, has been insightful and illuminating, but short of definitive. While this Court's decision may set the initial judicial course of this case, it will certainly not be the final word.

The historically-accepted contours of Article I Commerce Clause power were restated by the Supreme Court in *Perez v. United States,* 402 U.S. 146, 150, 91 S. Ct. 1357, 1359 (1971). First, Congress can regulate the channels of interstate commerce. *Id.* Second, Congress has the authority to regulate and protect the instrumentalities of interstate commerce and persons or things in interstate commerce. *Id.* Third, Congress has the power to regulate activities that substantially affect interstate commerce. *Id.* It appears from the argument and memoranda of counsel that only the third category is implicated in the case at hand.

In arguing that an individual's decision not to purchase health insurance is in effect "economic activity," the Secretary relies on an aggregation theory. In other words, the sum of individual decisions to participate or not in the health insurance market has a critical effect on interstate commerce.

The Secretary's argument is drawn in large measure from the teachings of the Supreme Court in *Gonzales v. Raich,* 545 U.S. 1, 125 S. Ct. 2195 (2005), wherein the Court noted:

> [O]ur case law firmly establishes Congress' power to regulate purely local activities that are part of an economic "class of activities" that have a substantial effect on interstate commerce. . . . When Congress decides that the "total incidence" of a practice poses a threat to a national market, it may regulate the entire class. . . . In this vein, we have reiterated that when "a general regulatory statute bears a substantial relation to commerce, the *de minimis* character of individual instances arising under that statute is of no consequence."

Gonzales, 545 U.S. at 17, 125 S. Ct. at 2205-06 (quoting *United States v. Lopez,* 514 U.S. 549, 558, 115 S. Ct. 1624, 1629 (1995)).

In the Secretary's view, without full market participation, the financial foundation supporting the health care system will fail, in effect causing the health care regime to "implode." At oral argument, the Deputy Assistant Attorney General of the United States, on behalf of the Secretary, described the collective effect of the Minimum Essential Coverage Provision as the critical element of the national health care scheme, "[a]nd what the [congressional] testimony was, was if you do the preexisting condition exclusion and no differential health care

status, without a minimum coverage type provision, it will inexorably drive that market into extinction. And what somebody said more succinctly was, the market will implode." (Tr. 33:7-13, July 1, 2010.)

To support this argument, the Secretary compared the market impact of the universal insurance requirement to regulation of wheat harvested for personal consumption or marijuana grown for personal use. In *Wickard v. Filburn,* 317 U.S. 111, 63 S. Ct. 82 (1942), acknowledged by most constitutional scholars as the most expansive application of the Commerce Clause, the Supreme Court upheld the power of Congress to regulate the personal cultivation and consumption of wheat on a private farm. The Court reasoned that the consumption of such non-commercially produced wheat reduced the amount of commercially produced wheat purchased and consumed nationally, thereby affecting interstate commerce. The Court concluded:

> [The fact that] appellee's own contribution to the demand for wheat may be trivial by itself is not enough to remove him from the scope of federal regulation where, as here, his contribution, taken together with that of many others similarly situated, is far from trivial. . . . But if we assume that it is never marketed, it supplies a need of the man who grew it which would otherwise be reflected by purchases in the open market.

Wickard, 317 U.S. at 127-28, 63 S. Ct. at 90-91.

Similarly, in *Gonzales v. Raich,* the Supreme Court concluded that the aggregate effect of personal growth and consumption of marijuana for medicinal purposes, pursuant to California law, had a sufficient impact on interstate commerce to warrant regulation under the Commerce Clause. "Like the farmer in *Wickard,* respondents are cultivating, for home consumption, a fungible commodity for which there is an established, albeit illegal, interstate market. . . . Here too, Congress had a rational basis for concluding that leaving home-consumed marijuana outside federal control would similarly affect price and market conditions." *Gonzales,* 545 U.S. at 18-19, 125 S. Ct. at 2206-07.

In response, the Commonwealth highlights what it perceives to be the critical distinction between the line of cases relied upon by the Secretary and the Commerce Clause application presently before the Court. What the Supreme Court deemed to be "economic activity" in *Wickard* and *Raich* necessarily involved a voluntary decision to perform an act, such as growing wheat or cultivating marijuana. The Commonwealth argues that this critical element is absent in the regulatory mechanism established in the Minimum Essential Coverage Provision. This provision, the Commonwealth maintains, requires a person to perform an involuntary act and as a result, submit to Commerce Clause regulation. The Commonwealth continues that neither the U.S. Supreme Court nor any circuit court of appeals has

upheld the extension of Commerce Clause power to encompass economic inactivity.

Drawing on the logic articulated in *United States v. Lopez,* 514 U.S. 549, 115 S. Ct. 1624 (1995), and *United States v. Morrison,* 529 U.S. 598, 120 S. Ct. 1740 (2000), which limited the boundaries of Commerce Clause jurisdiction to activities truly economic in nature and that actually affect interstate commerce, the Commonwealth contends that a decision not to purchase a product, such as health insurance, is not an economic activity. It is a virtual state of repose – or idleness – the converse of activity. At best, Section 1501 regulates future activity in anticipation of need.

In *United States v. Morrison,* the Court acknowledged that its "interpretation of the Commerce Clause has changed as our Nation has developed. . . . [E]ven [our] modern-era precedents which have expanded congressional power under the Commerce Clause confirm that this power is subject to outer limits." *Morrison,* 529 U.S. at 607-08, 120 S. Ct. at 1748-49 (quoting *NLRB v. Jones & Laughlin Steel Corp.,* 301 U.S. 1, 57 S. Ct. 615 (1937)). The Court in *Morrison* also noted that "the existence of congressional findings is not sufficient, by itself, to sustain the constitutionality of Commerce Clause legislation." *Morrison,* 529 U.S. at 614, 120 S. Ct. at 1752. Finally, in *Morrison,* the Court rejected "the argument that Congress may regulate noneconomic, violent criminal conduct based solely on that

conduct's aggregate effect on interstate commerce." *Id.* at 617, 120 S. Ct. at 1754.

The Commonwealth further maintains that the Secretary's position finds no sustenance in the Necessary and Proper Clause. U.S. Const. art. I, § 8. This clause grants Congress broad authority to pass laws in furtherance of its constitutionally-enumerated powers. The Commonwealth draws the Court's attention to several observations of the Supreme Court in the recent case of *United States v. Comstock,* 130 S. Ct. 1949 (2010). The Court in *Comstock* began its analysis by quoting Chief Justice Marshall in *McCulloch v. Maryland,* 17 U.S. (4 Wheat.) 316 (1819): "Let the end be legitimate, let it be within the scope of the constitution, and all means which are appropriate, which are plainly adapted to that end, which are not prohibited, but consistent with the letter and spirit of the constitution, are constitutional." *Comstock,* 130 S. Ct. at 1956 (quoting *McCulloch*, 17 U.S. (4 Wheat.) at 421).

In commenting on Chief Justice Marshall's remarks, the Court in *Comstock* noted that:

> [W]e have since made clear that, in determining whether the Necessary and Proper Clause grants Congress the legislative authority to enact a particular federal statute, we look to see whether the statute constitutes a means that is rationally related to the implementation of a constitutionally enumerated power. . . . [T]he relevant inquiry is simply whether the

> means chosen are reasonably adapted to the attainment of a legitimate end under the commerce power or under other powers that the Constitution grants Congress the authority to implement.

Id. at 1956-57 (internal citations omitted).

The Commonwealth maintains that even if a congressional enactment is noble and legitimate, the means adapted to enforce it under the Necessary and Proper Clause must be within the letter and spirit of the Constitution. In other words, it must have a firm constitutional foundation rooted in Article I. The goals of those portions of the Patient Protection and Affordable Care Act directly pertinent to health care, i.e., universal health insurance coverage, no exclusion of persons with preexisting conditions, a requirement that all people receiving health care pay for such services in a timely fashion, etc., are laudable. The Commonwealth argues, however, that the Necessary and Proper Clause cannot be employed as a vehicle to enforce an unconstitutional exercise of Commerce Clause power, no matter how well intended. If a person's decision not to purchase health insurance at a particular point in time does not constitute the type of economic activity subject to regulation under the Commerce Clause, then logically, an attempt to enforce such provision under the Necessary and Proper Clause is equally offensive to the Constitution.

In rebuttal, the Secretary reiterates her position that a person cannot simply elect to avoid participation in the health care market. It is

inevitable, in her view, that every person – today or in the future – healthy or otherwise – will require medical care. The Minimum Essential Coverage Provision simply provides a vehicle for prompt and dependable payment for such services if and when rendered. The Secretary also rejects the notion that the imposition of a monetary penalty for failing to perform a lawful act is alien to the spirit of the Constitution. The Secretary points out that sanctions have historically been imposed for failure to timely file tax returns or truthfully report or pay taxes due, as well as failure to register with the Selective Service or report for military duty. These examples, as the Commonwealth aptly notes, are directly tethered to a specific constitutional provision empowering Congress to assess taxes and provide and maintain an Army and Navy. U.S. Const. art. I, § 8. No specifically articulated constitutional authority exists to mandate the purchase of health insurance or the assessment of a penalty for failing to do so.

As previously mentioned, the Commerce Clause aspect of this debate raises issues of national significance. The position of the parties are widely divergent and at times novel. The guiding precedent is informative, but inconclusive. Never before has the Commerce Clause and associated Necessary and Proper Clause been extended this far. At this juncture, the Court is not persuaded that the Secretary has demonstrated that the Complaint fails to state a cause of action with respect to the

Commerce Clause element. This portion of the Complaint advances a plausible claim with an arguable legal basis.

V.

The final aspect of the Secretary's Rule 12(b)(6) challenge raises an even closer and equally unsettled issue under congressional taxing powers. Contrary to pre-enactment representations by the Executive and Legislative branches, the Secretary now argues alternatively that the Minimum Essential Coverage Provision is a product of the government's power to tax for the general welfare. (Tr. 19:16-17, July 1, 2010.) This is of course supported by the placement of the penalty provisions within the Internal Revenue Code. Because the Secretary contends that the Minimum Essential Coverage Provision is an exercise of the less bridled power of Congress to tax, this element of the argument presents a much closer question than the preceding Commerce Clause debate.

The Secretary suggests that the constitutional analysis under the Tax Clause involves only two factors. Relying on *United States v. Aiken,* 974 F.2d 446 (4th Cir. 1992), she asserts that the power of Congress to lay and collect taxes, duties, and excises, under Article I, Section 8 of the U.S. Constitution, requires only that it be a revenue-raising measure and that the associated regulatory provisions bear a reasonable relation to the statute's taxing purpose.

Id. at 448; *see also Sonzinsky v. United States,* 300 U.S. 506, 513, 57 S. Ct. 554, 555-56 (1937); *United States v. Doremus,* 249 U.S. 86, 39 S. Ct. 214 (1919). According to the Secretary, the power of Congress to tax for the general welfare is checked only by the electorate. "Unless there are provisions, extraneous to any tax need, courts are without authority to limit the exercise of the taxing power." *United States v. Kahriger,* 345 U.S. 22, 31, 73 S. Ct. 510, 515 (1953), *overruled on other grounds, Marchetti v. United Sales* [sic], 390 U.S. 39, 88 S. Ct. 697 (1968). The Secretary points out that the power of Congress to use its taxing and spending power under the General Welfare Clause has long been recognized as extensive. *McCray v. United States,* 195 U.S. 27, 56-59, 24 S. Ct. 769, 776-78 (1904). Furthermore, the Secretary notes that Congress may use its power under the Tax Clause even for purposes that would exceed its powers under other provisions of Article I. *United States v. Sanchez,* 340 U.S. 42, 44, 71 S. Ct. 108, 110 (1950).

Therefore, the Secretary argues that because the Minimum Essential Coverage Provision in fact generates revenue and its regulatory features are rationally related to the goal of requiring every individual to pay for the medical services they receive, "that's the end of the ballgame." (Tr. 44:11, July 1, 2010.)

Initially, in response, the Commonwealth contends that the noncompliance penalty provision in Section 1501 does not meet the historical criteria for

a tax.[7] Aside from being referred to in Section 1501 at Section 5000A(b)(1) as a "penalty," the clear purpose of the assessment is to regulate conduct, not generate revenue for the government.[8] In fact, the Commonwealth adds that if there is full compliance – if everyone purchases health insurance as required – this provision will generate no revenue. The Commonwealth's doubt as to its purported purpose is heightened further by the prefatory language of Section 1501 which describes it as a derivative of the Commerce Clause. The Solicitor General of Virginia correctly noted during oral argument that the power of Congress to exact a penalty is more constrained than its taxing authority under the General Welfare Clause – it must be in aid of an enumerated power. *Sunshine Anthracite Coal Co. v. Adkins,* 310 U.S. 381, 393, 60 S. Ct. 907, 912 (1940); *United States v. Butler,* 297 U.S. 1, 61, 56 S. Ct. 312, 317 (1936).

---

[7] "[A] tax is a pecuniary burden laid upon individuals or property for the purpose of supporting the Government." *United States v. Reorganized CF&I Fabricators of Utah, Inc.,* 518 U.S. 213, 224, 116 S. Ct. 2106, 2112 (1996) (internal citations omitted). On the other hand, a penalty imports the notion of a punishment for an unlawful act or omission. *Id.* "The two words [tax vs. penalty] are not interchangeable . . . and if an exaction [is] clearly a penalty it cannot be converted into a tax by the simple expedient of calling it such." *United States v. La Franca,* 282 U.S. 568, 572, 51 S. Ct. 278, 280 (1931).

[8] In contrast, the Commonwealth points out that elsewhere in the Act, Congress specifically described levies as taxes, such as Sections 9001, 9004, 9015, and 9017.

Although the Commonwealth concedes that the power of Congress to tax exceeds its ability to regulate under the Commerce Clause, it is not without limitation. "[T]he law is that Congress can tax under its taxing power that which it can't regulate, but it can't regulate through taxation that which it cannot otherwise regulate." (Tr. 81:18-21, July 1, 2010 (citing *Bailey v. Drexel Furniture Co. (Child Labor Tax Case),* 259 U.S. 20, 37, 42 S. Ct. 449, 450 (1922).) To amplify its point, the Commonwealth focuses the Court's attention on a series of cases in which the Supreme Court struck down certain "regulatory taxes" as an unconstitutional encroachment on the state's power of regulation under the Tenth Amendment. *See Butler,* 297 U.S. at 68, 56 S. Ct. at 320; *Linder v. United States,* 268 U.S. 5, 17-18, 45 S. Ct. 446, 449 (1925); *Child Labor Tax Case,* 259 U.S. at 35, 42 S. Ct. at 451. In commenting on the limitations on the power of Congress to levy taxes to promote the general welfare, the Court in *Butler* noted that, "despite the breadth of the legislative discretion, our duty to hear and to render, judgment remains. If the statute plainly violates the stated principle of the Constitution, we must so declare." *Butler,* 297 U.S. at 67, 56 S. Ct. at 320; *see also Kahriger,* 345 U.S. at 29, 73 S. Ct. at 513.[9]

---

[9] Citing commentaries from a number of constitutional scholars, the Secretary maintains that this line of cases has fallen into desuetude. The Commonwealth counters that none of these cases have been overruled by the U.S. Supreme Court.

By analogy, the Commonwealth argues that the Minimum Essential Coverage Provision not only invokes rights reserved to the states, but also seeks to compel activity beyond the reach of Congress. As discussed above, the division of responsibility for regulating insurance between the Commonwealth and the federal government, to the extent relevant, is yet to be adequately staked out in this case.

The centerpiece of the Complaint at issue is its contention that Congress lacks the authority to regulate economic inactivity. Lacking such power to regulate a person's decision not to participate in interstate commerce, logically, the Commonwealth argues, Congress would not have the power to tax or impose a penalty for such inactivity. This, of course, is the core issue in this case.

To bolster its position, the Commonwealth suggests that a careful survey of constitutional history yields no basis for such extension of Tax Clause powers. In its Memorandum in Opposition to Motion to Dismiss, the Commonwealth observes that "historically, direct taxes were taxes on persons or things, while duties, imposts, and excises have never meant a tax on a decision not to purchase or not to do something unrelated to a larger voluntary business or other undertaking." (Pl. Mem. Opp'n Mot. Dismiss 32.)

In her opposition, the Secretary rejoins that the Commonwealth misinterprets the limitations of Congress's power under the Tax Clause. "[A] tax

statute [does not] necessarily fall because it touches on activities which Congress might not otherwise regulate." *Sanchez,* 340 U.S. at 44, 71 S. Ct. at 110. For example, the Secretary argues that Congress can tax inheritances even though the regulation of estates and inheritances is beyond Congress's Commerce Clause powers. *Knowlton v. Moore,* 178 U.S. 41, 59-60, 20 S. Ct. 747, 755 (1900). The Secretary stresses that "[i]t is beyond serious question that a tax does not cease to be valid merely because it regulates, discourages, or even definitely deters the activities taxed." *Sanchez,* 340 U.S. at 44, 71 S. Ct. at 110. "[A] tax is not any the less a tax because it has a regulatory effect. . . ." *Sonzinsky,* 300 U.S. at 513, 57 S. Ct. at 556 (internal citations omitted).

Casting aside many aspects of the Commonwealth's argument, the Secretary contends that in the final analysis, the Minimum Essential Coverage Provision falls within Congress's extensive general welfare authority. She also underscores that decisions of how best to provide for the general welfare are for the representative branches, not for the courts. *Helvering v. Davis,* 301 U.S. 619, 640, 57 S. Ct. 904, 908 (1937). "Inquiry into the hidden motives which may move Congress to exercise a power constitutionally conferred upon it is beyond the competency of courts." *Sonzinsky,* 300 U.S. at 513-14, 57 S. Ct. at 556.

In enacting Section 1501 of the Patient Protection and Affordable Care Act, Congress made extensive findings on the substantial effect of

decisions to purchase health insurance on the vast interstate health care market. These findings alone, in the Secretary's view, provide more than adequate support for her contention that the penalty (or tax) at issue is rationally related to the objective of maintaining a financially viable health care market by requiring everyone to pay for the services they receive. She adds, through counsel, "[t]hat consuming health care services without paying for them is activity, plain and simple." (Tr. 92:12-14, July 1, 2010.) In this context, a consumer's failure to act is a clear burden on interstate commerce.

The Secretary appeared to concede during oral argument, however, that if the ability to require the Minimum Essential Coverage Provision is not within the letter and spirit of the Constitution, than the penalty necessarily fails. As the Deputy Assistant Attorney General of the United States appeared to note in his response to the Court, "if it is unconstitutional, then the penalty would fail as well." (Tr. 21:10-11, July 1, 2010.)

VI.

While this case raises a host of complex constitutional issues, all seem to distill to the single question of whether or not Congress has the power to regulate – and tax – a citizen's decision not to participate in interstate commerce. Neither the U.S. Supreme Court nor any circuit court of appeals has squarely addressed this issue. No reported case from

any federal appellate court has extended the Commerce Clause or Tax Clause to include the regulation of a person's decision not to purchase a product, notwithstanding its effect on interstate commerce. Given the presence of some authority arguably supporting the theory underlying each side's position, this Court cannot conclude at this stage that the Complaint fails to state a cause of action.[10]

The Secretary's Motion to Dismiss will therefore be denied. Resolution of the controlling issues in this case must await a hearing on the merits.

An appropriate Order will accompany this Memorandum Opinion.

/s/ Henry Hudson
Henry E. Hudson
United States District Judge

Date: Aug. 2, 2010
Richmond, VA

[10] "It is well-established that defendants bear the burden of proving that plaintiffs' claims fail as a matter of law." *Bennett v. MIS Corp.*, 607 F.3d 1076, 1091 (6th Cir. 2010). "Under Rule 12(b)(6), the party moving for dismissal has the burden of proving that no claim has been stated." James Wm. Moore, et al., *Moore's Federal Practice* § 12.34(1)(a) (3d ed. 2010).

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF VIRGINIA
Richmond Division

COMMONWEALTH OF VIRGINIA EX REL. KENNETH T. CUCCINELLI, II, in his official capacity as Attorney General of Virginia, Plaintiff, v. KATHLEEN SEBELIUS, SECRETARY OF THE DEPARTMENT OF HEALTH AND HUMAN SERVICES, in her official capacity, Defendant.	Civil Action No. 3:10CV188-HEH

ORDER
(Denying Defendant's Motion to Dismiss)

(Filed Aug. 2, 2010)

THIS MATTER is before the Court on Defendant's Motion to Dismiss (Dk. No. 21), filed on May 24, 2010. For the reasons stated in the accompanying Memorandum Opinion, the Defendant's Motion to Dismiss is DENIED.

The Clerk is directed to send a copy of this Order and the accompanying Memorandum Opinion to all counsel of record.

It is SO ORDERED.

/s/ Henry Hudson
Henry E. Hudson
United States District Judge

Date: Aug. 2, 2010
Richmond, VA

FILED: January 20, 2011

UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

No. 11-1057(L)
(3:10-cv-00188-HEH)

COMMONWEALTH OF VIRGINIA, EX REL. KENNETH T. CUCCINELLI, II, in his official capacity as Attorney General of Virginia

Plaintiff-Appellee

v.

KATHLEEN SEBELIUS, Secretary of the Department of Health and Human Services, in her official capacity

Defendant-Appellant

v.

RAY ELBERT PARKER; AMERICAN CENTER FOR LAW & JUSTICE ET AL.; PHYSICIAN HOSPITALS OF AMERICA; SMALL BUSINESS MAJORITY FOUNDATION, INCORPORATED; CENTER FOR AMERICAN PROGRESS; FEDERAL RIGHTS PROJECT NATIONAL SENIOR CITIZENS LAW CENTER; WASHINGTON LEGAL FOUNDATION; LIBERTY GROUP; CONSTITUTIONAL LAW PROFESSORS; CATO INSTITUTE; LANDMARK LEGAL FOUNDATION; RANDY E. BARNETT, Professor; COMPETITIVE ENTERPRISE INSTITUTE; W. SPENCER CONNERAT, III; STEVEN J. WILLIS; PACIFIC LEGAL

FOUNDATION; YOUNG INVINCIBLES; WILLIAM P. BARR; EDWIN MEESE, III; RICHARD L. THORNBURGH; EVE ELLINGWOOD, a/k/a Cohen Sternlight, Judge, Retired; AMERICAN CIVIL RIGHTS UNION; AMERICANS FOR FREE CHOICE IN MEDICINE; MOUNTAIN STATES LEGAL FOUNDATION; VIRGINIA ORGANIZING

Movants

No. 11-1058
(3:10-cv-00188-HEH)

COMMONWEALTH OF VIRGINIA, EX REL. KENNETH T. CUCCINELLI, II, in his official capacity as Attorney General of Virginia

Plaintiff-Appellant

v.

KATHLEEN SEBELIUS, Secretary of the Department of Health and Human Services, in her official capacity

Defendant-Appellee

v.

RAY ELBERT PARKER; AMERICAN CENTER FOR LAW & JUSTICE ET AL.; PHYSICIAN HOSPITALS OF AMERICA; SMALL BUSINESS MAJORITY FOUNDATION, INCORPORATED; CENTER FOR AMERICAN PROGRESS; FEDERAL RIGHTS PROJECT NATIONAL SENIOR CITIZENS LAW CENTER; WASHINGTON LEGAL FOUNDATION; LIBERTY GROUP; CONSTITUTIONAL LAW

PROFESSORS; CATO INSTITUTE; LANDMARK LEGAL FOUNDATION; RANDY E. BARNETT, Professor; COMPETITIVE ENTERPRISE INSTITUTE; W. SPENCER CONNERAT, III; STEVEN J. WILLIS; PACIFIC LEGAL FOUNDATION; YOUNG INVINCIBLES; WILLIAM P. BARR; EDWIN MEESE, III; RICHARD L. THORNBURGH; EVE ELLINGWOOD, a/k/a Cohen Sternlight, Judge, Retired; AMERICAN CIVIL RIGHTS UNION; AMERICANS FOR FREE CHOICE IN MEDICINE; MOUNTAIN STATES LEGAL FOUNDATION; VIRGINIA ORGANIZING

Movants

ORDER

The Court consolidates Case No. 11-1057 and Case No. 11-1058. The appellant in Case No. 11-1057 shall be considered the appellant for purposes of the consolidated appeals and shall proceed first at briefing and at oral argument. Entry of appearance forms and disclosure statements filed by counsel and parties to the lead case are deemed filed in the secondary case.

For the Court – By Direction

/s/ Patricia S. Connor, Clerk

Filed: January 20, 2011

UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT
1100 East Main Street, Suite 501
Richmond, Virginia 23219-3517
www.ca4.uscourts.gov

DOCKETING NOTICE –
APPEAL FROM DISTRICT COURT

No. 11-1057, *Commonwealth of Virginia v. Kathleen Sebelius*
3:10-cv-00188-HEH

This case has been placed on the Court's docket under the above-referenced number, which should be used on papers subsequently filed in this Court.

Counsel are responsible for ensuring that documents are timely filed by actual receipt as required in the appropriate clerk's office. Noncompliance with jurisdictional deadlines will prevent the Court from considering the case, and failure to meet other deadlines may result in dismissal for failure to prosecute or in imposition of sanctions. *See* Local Rules 45, 46(g).

In cases in which more than one attorney represents a party, future notices will be sent only to attorneys who have entered an appearance as counsel of record; other attorneys will be removed from the case.

Counsel are responsible for ensuring that social security numbers, juvenile names, dates of birth, and financial account numbers are redacted from any documents filed with the Court and that any sealed materials are filed in accordance with the enclosed ***Memorandum on Sealed and Confidential Materials***. Counsel must obtain an Appellate CM/ECF Filer Account as outlined in the ***Notice Regarding Implementation of CM/ECF***; electronic filing is mandatory for counsel in all Fourth Circuit cases effective June 1, 2008.

Counsel must file the initial forms required upon docketing, as set forth in the following table of forms, in the clerk's office within **14 days** of the date of this notice. The forms can be completed and printed or saved in electronic form.

Click on a link to display the required form; all forms are also available at www.ca4.uscourts.gov.

Form:	**Required From:**	**Required Number:**
Appearance of Counsel	Counsel of record for any party to the appeal (If not admitted to this Court, counsel must complete and submit an ***application for admission***.)	Original only

Disclosure Statement	All parties to a civil or bankruptcy case and all corporate defendants in a criminal case (not required from the United States, from indigent parties, or from state or local governments in pro se cases)	Original only
Docketing Statement	Appellant's counsel (not required after Rule 5 grant of permission to appeal)	Original only
Transcript Order	Appellant, only if ordering transcript (not required from appellee)	Attach to docketing statement
CJA 24	Appellant, only if transcript is at court expense under Criminal Justice Act (not required from appellee)	Attach to docketing statement

I will be the case manager for this case. Please contact me at the number listed below if you have any questions regarding your case.

RJ Warren
Deputy Clerk
804-916-2702

CONSTITUTIONAL PROVISIONS

Article I, § 8, clauses 1 and 3 of the United States Constitution provides in relevant part:

The Congress shall have power to lay and collect taxes . . . to pay the debts and provide for the . . . general welfare of the United States; but all duties imposts and excises shall be uniform throughout the United States;

* * *

To regulate commerce with foreign nations, and among the several states, and with the Indian Tribes;

* * *

STATUTORY PROVISIONS

Excerpts from the Patient Protection and Affordable Care Act, Pub. L. No. 111-148, 124 Stat. 119 (2010).

Sec. 1501. REQUIREMENT TO MAINTAIN MINIMUM ESSENTIAL COVERAGE.

(a) Findings. – Congress makes the following findings:

(1) In general. – The individual responsibility requirement provided for in this section (in this subsection referred to as the "requirement") is commercial and economic in nature, and substantially affects interstate commerce, as a result of the effects described in paragraph (2).

(2) Effects on the national economy and interstate commerce. – The effects described in this paragraph are the following:

(A) The requirement regulates activity that is commercial and economic in nature: economic and financial decisions about how and when health care is paid for, and when health insurance is purchased.

(B) Health insurance and health care services are a significant part of the national economy. National health spending is projected to increase from $ 2,500,000,000,000, or 17.6 percent of the economy, in 2009 to $ 4,700,000,000,000 in 2019. Private health insurance spending is projected to be $ 854,000,000,000 in 2009, and pays for medical supplies, drugs, and equipment that are shipped in

interstate commerce. Since most health insurance is sold by national or regional health insurance companies, health insurance is sold in interstate commerce and claims payments flow through interstate commerce.

(C) The requirement, together with the other provisions of this Act, will add millions of new consumers to the health insurance market, increasing the supply of, and demand for, health care services. According to the Congressional Budget Office, the requirement will increase the number and share of Americans who are insured.

(D) The requirement achieves near-universal coverage by building upon and strengthening the private employer-based health insurance system, which covers 176,000,000 Americans nationwide. In Massachusetts, a similar requirement has strengthened private employer-based coverage: despite the economic downturn, the number of workers offered employer-based coverage has actually increased.

(E) Half of all personal bankruptcies are caused in part by medical expenses. By significantly increasing health insurance coverage, the requirement, together with the other provisions of this Act, will improve financial security for families.

(F) Under the Employee Retirement Income Security Act of 1974 (29 U.S.C. 1001 et seq.), the Public Health Service Act (42 U.S.C. 201 et seq.), and this Act, the Federal Government has a

significant role in regulating health insurance which is in interstate commerce.

(G) Under sections 2704 and 2705 of the Public Health Service Act (as added by section 1201 of this Act), if there were no requirement, many individuals would wait to purchase health insurance until they needed care. By significantly increasing health insurance coverage, the requirement, together with the other provisions of this Act, will minimize this adverse selection and broaden the health insurance risk pool to include healthy individuals, which will lower health insurance premiums. The requirement is essential to creating effective health insurance markets in which improved health insurance products that are guaranteed issue and do not exclude coverage of pre-existing conditions can be sold.

(H) Administrative costs for private health insurance, which were $ 90,000,000,000 in 2006, are 26 to 30 percent of premiums in the current individual and small group markets. By significantly increasing health insurance coverage and the size of purchasing pools, which will increase economies of scale, the requirement, together with the other provisions of this Act, will significantly reduce administrative costs and lower health insurance premiums. The requirement is essential to creating effective health insurance markets that do not require underwriting and eliminate its associated administrative costs.

(3) Supreme Court ruling. – In *United States v. South-Eastern Underwriters Association* (322 U.S. 533 (1944)), the Supreme Court of the United States ruled that insurance is interstate commerce subject to Federal regulation. (b) In General. – Subtitle D of the Internal Revenue Code of 1986 is amended by adding at the end the following new chapter:

"CHAPTER 48 – MAINTENANCE OF MINIMUM ESSENTIAL COVERAGE

"Sec. 5000A. Requirement to maintain minimum essential coverage.

"Sec. 5000A. REQUIREMENT TO MAINTAIN MINIMUM ESSENTIAL COVERAGE.

"(a) Requirement To Maintain Minimum Essential Coverage. – An applicable individual shall for each month beginning after 2013 ensure that the individual, and any dependent of the individual who is an applicable individual, is covered under minimum essential coverage for such month.

"(b) Shared Responsibility Payment. –

"(1) In general. – If an applicable individual fails to meet the requirement of subsection (a) for 1 or more months during any calendar year beginning after 2013, then, except as provided in subsection (d), there is hereby imposed a penalty with respect to the individual in the amount determined under subsection (c).

"(2) Inclusion with return. – Any penalty imposed by this section with respect to any month shall be included with a taxpayer's return under chapter 1 for the taxable year which includes such month.

"(3) Payment of penalty. – If an individual with respect to whom a penalty is imposed by this section for any month –

"(A) is a dependent (as defined in section 152) of another taxpayer for the other taxpayer's taxable year including such month, such other taxpayer shall be liable for such penalty, or

"(B) files a joint return for the taxable year including such month, such individual and the spouse of such individual shall be jointly liable for such penalty.

"(c) Amount of Penalty. –

"(1) In general. – The penalty determined under this subsection for any month with respect to any individual is an amount equal to 1/12 of the applicable dollar amount for the calendar year.

"(2) Dollar limitation. – The amount of the penalty imposed by this section on any taxpayer for any taxable year with respect to all individuals for whom the taxpayer is liable under subsection (b)(3) shall not exceed an amount equal to 300 percent the applicable dollar amount (determined without regard to paragraph (3)(C)) for the calendar year with or within which the taxable year ends.

"(3) Applicable dollar amount. – For purposes of paragraph (1) –

"(A) In general. – Except as provided in subparagraphs (B) and (C), the applicable dollar amount is $ 750.

"(B) Phase in. – The applicable dollar amount is $ 95 for 2014 and $ 350 for 2015.

"(C) Special rule for individuals under age 18. – If an applicable individual has not attained the age of 18 as of the beginning of a month, the applicable dollar amount with respect to such individual for the month shall be equal to one-half of the applicable dollar amount for the calendar year in which the month occurs.

"(D) Indexing of amount. – In the case of any calendar year beginning after 2016, the applicable dollar amount shall be equal to $ 750, increased by an amount equal to –

"(i) $ 750, multiplied by

"(ii) the cost-of-living adjustment determined under section 1(f)(3) for the calendar year, determined by substituting 'calendar year 2015' for 'calendar year 1992' in subparagraph (B) thereof.

If the amount of any increase under clause (i) is not a multiple of $ 50, such increase shall be rounded to the next lowest multiple of $ 50.

"(4) Terms relating to income and families. – For purposes of this section –

"(A) Family size. – The family size involved with respect to any taxpayer shall be equal to the number of individuals for whom the taxpayer is allowed a deduction under section 151 (relating to allowance of deduction for personal exemptions) for the taxable year.

"(B) Household income. – The term 'household income' means, with respect to any taxpayer for any taxable year, an amount equal to the sum of –

"(i) the modified gross income of the taxpayer, plus

"(ii) the aggregate modified gross incomes of all other individuals who –

"(I) were taken into account in determining the taxpayer's family size under paragraph (1), and

"(II) were required to file a return of tax imposed by section 1 for the taxable year.

"(C) Modified gross income. – The term 'modified gross income' means gross income –

"(i) decreased by the amount of any deduction allowable under paragraph (1), (3), (4), or (10) of section 62(a),

"(ii) increased by the amount of interest received or accrued during the taxable year which is exempt from tax imposed by this chapter, and

"(iii) determined without regard to sections 911, 931, and 933.

"(D) Poverty line. –

"(i) In general. – The term 'poverty line' has the meaning given that term in section 2110(c)(5) of the Social Security Act (42 U.S.C. 1397jj(c)(5)).

"(ii) Poverty line used. – In the case of any taxable year ending with or within a calendar year, the poverty line used shall be the most recently published poverty line as of the 1st day of such calendar year.

"(d) Applicable Individual. – For purposes of this section –

"(1) In general. – The term 'applicable individual' means, with respect to any month, an individual other than an individual described in paragraph (2), (3), or (4).

"(2) Religious exemptions. –

"(A) Religious conscience exemption. – Such term shall not include any individual for any month if such individual has in effect an exemption under section 1311(d)(4)(H) of the Patient Protection and Affordable Care Act which certifies that such individual is a member of a recognized religious sect or division thereof described in section 1402(g)(1) and an adherent of established tenets or teachings of such sect or division as described in such section.

"(B) Health care sharing ministry. –

"(i) In general. – Such term shall not include any individual for any month if such individual is a member of a health care sharing ministry for the month.

"(ii) Health care sharing ministry. – The term 'health care sharing ministry' means an organization –

"(I) which is described in section 501(c)(3) and is exempt from taxation under section 501(a),

"(II) members of which share a common set of ethical or religious beliefs and share medical expenses among members in accordance with those beliefs and without regard to the State in which a member resides or is employed,

"(III) members of which retain membership even after they develop a medical condition,

"(IV) which (or a predecessor of which) has been in existence at all times since December 31, 1999, and medical expenses of its members have been shared continuously and without interruption since at least December 31, 1999, and

"(V) which conducts an annual audit which is performed by an independent certified public accounting firm in accordance with generally accepted accounting principles and which is made available to the public upon request.

"(3) Individuals not lawfully present. – Such term shall not include an individual for any month if for the month the individual is not a citizen or national of the United States or an alien lawfully present in the United States.

"(4) Incarcerated individuals. – Such term shall not include an individual for any month if for the month the individual is incarcerated, other than incarceration pending the disposition of charges.

"(e) Exemptions. – No penalty shall be imposed under subsection (a) with respect to –

"(1) Individuals who cannot afford coverage. –

"(A) In general. – Any applicable individual for any month if the applicable individual's required contribution (determined on an annual basis) for coverage for the month exceeds 8 percent of such individual's household income for the taxable year described in section 1412(b)(1)(B) of the Patient Protection and Affordable Care Act. For purposes of applying this subparagraph, the taxpayer's household income shall be increased by any exclusion from gross income for any portion of the required contribution made through a salary reduction arrangement.

"(B) Required contribution. – For purposes of this paragraph, the term 'required contribution' means –

"(i) in the case of an individual eligible to purchase minimum essential coverage consisting of coverage through an eligible-employer-sponsored

plan, the portion of the annual premium which would be paid by the individual (without regard to whether paid through salary reduction or otherwise) for self-only coverage, or

"(ii) in the case of an individual eligible only to purchase minimum essential coverage described in subsection (f)(1)(C), the annual premium for the lowest cost bronze plan available in the individual market through the Exchange in the State in the rating area in which the individual resides (without regard to whether the individual purchased a qualified health plan through the Exchange), reduced by the amount of the credit allowable under section 36B for the taxable year (determined as if the individual was covered by a qualified health plan offered through the Exchange for the entire taxable year).

"(C) Special rules for individuals related to employees. – For purposes of subparagraph (B)(i), if an applicable individual is eligible for minimum essential coverage through an employer by reason of a relationship to an employee, the determination shall be made by reference to the affordability of the coverage to the employee.

"(D) Indexing. – In the case of plan years beginning in any calendar year after 2014, subparagraph (A) shall be applied by substituting for '8 percent' the percentage the Secretary of Health and Human Services determines reflects the excess of the rate of premium growth between the preceding

calendar year and 2013 over the rate of income growth for such period.

"(2) Taxpayers with income under 100 percent of poverty line. – Any applicable individual for any month during a calendar year if the individual's household income for the taxable year described in section 1412(b)(1)(B) of the Patient Protection and Affordable Care Act is less than 100 percent of the poverty line for the size of the family involved (determined in the same manner as under subsection (b)(4)).

"(3) Members of Indian tribes. – Any applicable individual for any month during which the individual is a member of an Indian tribe (as defined in section 45A(c)(6)).

"(4) Months during short coverage gaps. –

"(A) In general. – Any month the last day of which occurred during a period in which the applicable individual was not covered by minimum essential coverage for a continuous period of less than 3 months.

"(B) Special rules. – For purposes of applying this paragraph –

"(i) the length of a continuous period shall be determined without regard to the calendar years in which months in such period occur,

"(ii) if a continuous period is greater than the period allowed under subparagraph (A), no

exception shall be provided under this paragraph for any month in the period, and

"(iii) if there is more than 1 continuous period described in subparagraph (A) covering months in a calendar year, the exception provided by this paragraph shall only apply to months in the first of such periods. The Secretary shall prescribe rules for the collection of the penalty imposed by this section in cases where continuous periods include months in more than 1 taxable year.

"(5) Hardships. – Any applicable individual who for any month is determined by the Secretary of Health and Human Services under section 1311(d)(4)(H) to have suffered a hardship with respect to the capability to obtain coverage under a qualified health plan.

"(f) Minimum Essential Coverage. – For purposes of this section –

"(1) In general. – The term 'minimum essential coverage' means any of the following:

"(A) Government sponsored programs. – Coverage under –

"(i) the Medicare program under part A of title XVIII of the Social Security Act,

"(ii) the Medicaid program under title XIX of the Social Security Act,

"(iii) the CHIP program under title XXI of the Social Security Act,

"(iv) the TRICARE for Life program,

"(v) the veteran's health care program under chapter 17 of title 38, United States Code, or

"(vi) a health plan under section 2504(e) of title 22, United States Code (relating to Peace Corps volunteers).

"(B) Employer-sponsored plan. – Coverage under an eligible employer-sponsored plan.

"(C) Plans in the individual market. – Coverage under a health plan offered in the individual market within a State.

"(D) Grandfathered health plan. – Coverage under a grandfathered health plan.

"(E) Other coverage. – Such other health benefits coverage, such as a State health benefits risk pool, as the Secretary of Health and Human Services, in coordination with the Secretary, recognizes for purposes of this subsection.

"(2) Eligible employer-sponsored plan. – The term 'eligible employer-sponsored plan' means, with respect to any employee, a group health plan or group health insurance coverage offered by an employer to the employee which is –

"(A) a governmental plan (within the meaning of section 2791(d)(8) of the Public Health Service Act), or

"(B) any other plan or coverage offered in the small or large group market within a State.

Such term shall include a grandfathered health plan described in paragraph (1)(D) offered in a group market.

"(3) Excepted benefits not treated as minimum essential coverage. – The term 'minimum essential coverage' shall not include health insurance coverage which consists of coverage of excepted benefits –

"(A) described in paragraph (1) of subsection (c) of section 2791 of the Public Health Service Act; or

"(B) described in paragraph (2), (3), or (4) of such subsection if the benefits are provided under a separate policy, certificate, or contract of insurance.

"(4) Individuals residing outside United States or residents of territories. – any applicable individual shall be treated as having minimum essential coverage for any month –

"(A) if such month occurs during any period described in subparagraph (A) or (B) of section 911(d)(1) which is applicable to the individual, or

"(B) if such individual is a bona fide resident of any possession of the United States (as determined under section 937(a)) for such month.

"(5) Insurance-related terms. – Any term used in this section which is also used in title I of the

Patient Protection and Affordable Care Act shall have the same meaning as when used in such title.

"(g) Administration and Procedure. –

"(1) In general. – The penalty provided by this section shall be paid upon notice and demand by the Secretary, and except as provided in paragraph (2), shall be assessed and collected in the same manner as an assessable penalty under subchapter B of chapter 68.

"(2) Special rules. – Notwithstanding any other provision of law –

"(A) Waiver of criminal penalties. – In the case of any failure by a taxpayer to timely pay any penalty imposed by this section, such taxpayer shall not be subject to any criminal prosecution or penalty with respect to such failure.

"(B) Limitations on liens and levies. – The Secretary shall not –

"(i) file notice of lien with respect to any property of a taxpayer by reason of any failure to pay the penalty imposed by this section, or

"(ii) levy on any such property with respect to such failure."

"(c) Clerical Amendment. – The table of chapters for subtitle D of the Internal Revenue Code of 1986 is amended by inserting after the item relating to chapter 47 the following new item:

"CHAPTER 48 – Maintenance of Minimum Essential Coverage."

"(d) Effective Date. – The amendments made by this section shall apply to taxable years ending after December 31, 2013.

STATE STATUTORY PROVISION

Virginia Code § 38.2-3430.1:1, provides that:

> No resident of this Commonwealth, regardless of whether he has or is eligible for health insurance coverage under any policy or program provided by or through his employer, or a plan sponsored by the Commonwealth or the federal government, shall be required to obtain or maintain a policy of individual insurance coverage except as required by a court or the Department of Social Services where an individual is named a party in a judicial or administrative proceeding. No provision of this title shall render a resident of this Commonwealth liable for any penalty, assessment, fee, or fine as a result of his failure to procure or obtain health insurance coverage. This section shall not apply to individuals voluntarily applying for coverage under a state-administered program pursuant to Title XIX or Title XXI of the Social Security Act. This section shall not apply to students being required by an institution of higher education to obtain and maintain health insurance as a condition of enrollment. Nothing herein shall impair the rights of persons to privately contract for health insurance for family members or former family members.

PUBLIC LAW 111-148 [H.R. 3590]
MAR. 23, 2010
PATIENT PROTECTION
AND AFFORDABLE CARE ACT

111 P.L. 148; 124 Stat. 119;
2010 Enacted H.R. 3590; 111 Enacted H.R. 3590

SECTION 1. SHORT TITLE; TABLE OF CONTENTS.

(a) Short Title. – This Act may be cited as the "Patient Protection and Affordable Care Act".

(b) Table of Contents. – The table of contents of this Act is as follows:

Sec. 1. Short title; table of contents.

TITLE I – QUALITY, AFFORDABLE HEALTH CARE FOR ALL AMERICANS
Subtitle A – Immediate Improvements in Health Care Coverage for All Americans
Sec. 1001. Amendments to the Public Health Service Act.

"Part A – Individual and Group Market Reforms
"Subpart II – Improving Coverage

"Sec. 2711. No lifetime or annual limits.

"Sec. 2712. Prohibition on rescissions.

"Sec. 2713. Coverage of preventive health services.

"Sec. 2714. Extension of dependent coverage.

"Sec. 2715. Development and utilization of uniform explanation of coverage documents and standardized definitions.

"Sec. 2716. Prohibition of discrimination based on salary.

"Sec. 2717. Ensuring the quality of care.

"Sec. 2718. Bringing down the cost of health care coverage.

"Sec. 2719. Appeals process.

Sec. 1002. Health insurance consumer information.

Sec. 1003. Ensuring that consumers get value for their dollars.

Sec. 1004. Effective dates.

Subtitle B – Immediate Actions to Preserve and Expand Coverage

Sec. 1101. Immediate access to insurance for uninsured individuals with a preexisting condition.

Sec. 1102. Reinsurance for early retirees.

Sec. 1103. Immediate information that allows consumers to identify affordable coverage options.

Sec. 1104. Administrative simplification.

Sec. 1105. Effective date.

Subtitle C – Quality Health Insurance Coverage for All Americans

Part I – Health Insurance Market Reforms

Sec. 1201. Amendment to the Public Health Service Act.

"Subpart I – General Reform

"Sec. 2704. Prohibition of preexisting condition exclusions or other discrimination based on health status.

"Sec. 2701. Fair health insurance premiums.

"Sec. 2702. Guaranteed availability of coverage.

"Sec. 2703. Guaranteed renewability of coverage.

"Sec. 2705. Prohibiting discrimination against individual participants and beneficiaries based on health status.

"Sec. 2706. Non-discrimination in health care.

"Sec. 2707. Comprehensive health insurance coverage.

"Sec. 2708. Prohibition on excessive waiting periods.

Part II – Other Provisions

Sec. 1251. Preservation of right to maintain existing coverage.

Sec. 1252. Rating reforms must apply uniformly to all health insurance issuers and group health plans.

Sec. 1253. Effective dates.

Subtitle D – Available Coverage Choices for All Americans

Part I – Establishment of Qualified Health Plans

Sec. 1301. Qualified health plan defined.

Sec. 1302. Essential health benefits requirements.

Sec. 1303. Special rules.

Sec. 1304. Related definitions.

Part II – Consumer Choices and Insurance Competition Through Health Benefit Exchanges

Sec. 1311. Affordable choices of health benefit plans.

Sec. 1312. Consumer choice.

Sec. 1313. Financial integrity.

Part III – State Flexibility Relating to Exchanges
Sec. 1321. State flexibility in operation and enforcement of Exchanges and related requirements.
Sec. 1322. Federal program to assist establishment and operation of nonprofit, member-run health insurance issuers.
Sec. 1323. Community health insurance option.
Sec. 1324. Level playing field.

Part IV – State Flexibility to Establish Alternative Programs
Sec. 1331. State flexibility to establish basic health programs for low-income individuals not eligible for Medicaid.
Sec. 1332. Waiver for State innovation.
Sec. 1333. Provisions relating to offering of plans in more than one State.

Part V – Reinsurance and Risk Adjustment
Sec. 1341. Transitional reinsurance program for individual and small group markets in each State.
Sec. 1342. Establishment of risk corridors for plans in individual and small group markets.
Sec. 1343. Risk adjustment.

Subtitle E – Affordable Coverage Choices for All Americans
Part I – Premium Tax Credits and Cost-sharing Reductions
Subpart A – Premium Tax Credits and Cost-Sharing Reductions
Sec. 1401. Refundable tax credit providing premium assistance for coverage under a qualified health plan.
Sec. 1402. Reduced cost-sharing for individuals enrolling in qualified health plans.

Subpart B – Eligibility Determinations
Sec. 1411. Procedures for determining eligibility for Exchange participation, premium tax credits and reduced cost-sharing, and individual responsibility exemptions.
Sec. 1412. Advance determination and payment of premium tax credits and cost-sharing reductions.
Sec. 1413. Streamlining of procedures for enrollment through an exchange and State Medicaid, CHIP, and health subsidy programs.
Sec. 1414. Disclosures to carry out eligibility requirements for certain programs.
Sec. 1415. Premium tax credit and cost-sharing reduction payments disregarded for Federal and Federally-assisted programs.

Part II – Small Business Tax Credit
Sec. 1421. Credit for employee health insurance expenses of small businesses.

Subtitle F – Shared Responsibility for Health Care
Part I – Individual Responsibility
Sec. 1501. Requirement to maintain minimum essential coverage.
Sec. 1502. Reporting of health insurance coverage.

Part II – Employer Responsibilities
Sec. 1511. Automatic enrollment for employees of large employers.
Sec. 1512. Employer requirement to inform employees of coverage options.
Sec. 1513. Shared responsibility for employers.
Sec. 1514. Reporting of employer health insurance coverage.
Sec. 1515. Offering of Exchange-participating qualified health plans through cafeteria plans.

Subtitle G – Miscellaneous Provisions
Sec. 1551. Definitions.
Sec. 1552. Transparency in government.
Sec. 1553. Prohibition against discrimination on assisted suicide.
Sec. 1554. Access to therapies.
Sec. 1555. Freedom not to participate in Federal health insurance programs.
Sec. 1556. Equity for certain eligible survivors.
Sec. 1557. Nondiscrimination.
Sec. 1558. Protections for employees.
Sec. 1559. Oversight.
Sec. 1560. Rules of construction.
Sec. 1561. Health information technology enrollment standards and protocols.
Sec. 1562. Conforming amendments.
Sec. 1563. Sense of the Senate promoting fiscal responsibility.

TITLE II – ROLE OF PUBLIC PROGRAMS
Subtitle A – Improved Access to Medicaid
Sec. 2001. Medicaid coverage for the lowest income populations.
Sec. 2002. Income eligibility for nonelderly determined using modified gross income.
Sec. 2003. Requirement to offer premium assistance for employer-sponsored insurance.
Sec. 2004. Medicaid coverage for former foster care children.
Sec. 2005. Payments to territories.
Sec. 2006. Special adjustment to FMAP determination for certain States recovering from a major disaster.
Sec. 2007. Medicaid Improvement Fund rescission.

Subtitle B – Enhanced Support for the Children's Health Insurance Program

Sec. 2101. Additional federal financial participation for CHIP.

Sec. 2102. Technical corrections.

Subtitle C – Medicaid and CHIP Enrollment Simplification

Sec. 2201. Enrollment Simplification and coordination with State Health Insurance Exchanges.

Sec. 2202. Permitting hospitals to make presumptive eligibility determinations for all Medicaid eligible populations.

Subtitle D – Improvements to Medicaid Services

Sec. 2301. Coverage for freestanding birth center services.

Sec. 2302. Concurrent care for children.

Sec. 2303. State eligibility option for family planning services.

Sec. 2304. Clarification of definition of medical assistance.

Subtitle E – New Options for States to Provide Long-Term Services and Supports

Sec. 2401. Community First Choice Option.

Sec. 2402. Removal of barriers to providing home and community-based services.

Sec. 2403. Money Follows the Person Rebalancing Demonstration.

Sec. 2404. Protection for recipients of home and community-based services against spousal impoverishment.

Sec. 2405. Funding to expand State Aging and Disability Resource Centers.
Sec. 2406. Sense of the Senate regarding long-term care.

Subtitle F – Medicaid Prescription Drug Coverage
Sec. 2501. Prescription drug rebates.
Sec. 2502. Elimination of exclusion of coverage of certain drugs.
Sec. 2503. Providing adequate pharmacy reimbursement.

Subtitle G – Medicaid Disproportionate Share Hospital (DSH) Payments
Sec. 2551. Disproportionate share hospital payments.

Subtitle H – Improved Coordination for Dual Eligible Beneficiaries
Sec. 2601. 5-year period for demonstration projects.
Sec. 2602. Providing Federal coverage and payment coordination for dual eligible beneficiaries.

Subtitle I – Improving the Quality of Medicaid for Patients and Providers
Sec. 2701. Adult health quality measures.
Sec. 2702. Payment Adjustment for Health Care-Acquired Conditions.
Sec. 2703. State option to provide health homes for enrollees with chronic conditions.
Sec. 2704. Demonstration project to evaluate integrated care around a hospitalization.
Sec. 2705. Medicaid Global Payment System Demonstration Project.
Sec. 2706. Pediatric Accountable Care Organization Demonstration Project.

Sec. 2707. Medicaid emergency psychiatric demonstration project.

Subtitle J – Improvements to the Medicaid and CHIP Payment and Access Commission (MACPAC)

Sec. 2801. MACPAC assessment of policies affecting all Medicaid beneficiaries.

Subtitle K – Protections for American Indians and Alaska Natives

Sec. 2901. Special rules relating to Indians.

Sec. 2902. Elimination of sunset for reimbursement for all Medicare part B services furnished by certain Indian hospitals and clinics.

Subtitle L – Maternal and Child Health Services

Sec. 2951. Maternal, infant, and early childhood home visiting programs.

Sec. 2952. Support, education, and research for postpartum depression.

Sec. 2953. Personal responsibility education.

Sec. 2954. Restoration of funding for abstinence education.

Sec. 2955. Inclusion of information about the importance of having a health care power of attorney in transition planning for children aging out of foster care and independent living programs.

TITLE III – IMPROVING THE QUALITY AND EFFICIENCY OF HEALTH CARE

Subtitle A – Transforming the Health Care Delivery System

Part I – Linking Payment to Quality Outcomes Under the Medicare Program

Sec. 3001. Hospital Value-Based purchasing program.

Sec. 3002. Improvements to the physician quality reporting system.
Sec. 3003. Improvements to the physician feedback program.
Sec. 3004. Quality reporting for long-term care hospitals, inpatient rehabilitation hospitals, and hospice programs.
Sec. 3005. Quality reporting for PPS-exempt cancer hospitals.
Sec. 3006. Plans for a Value-Based purchasing program for skilled nursing facilities and home health agencies.
Sec. 3007. Value-based payment modifier under the physician fee schedule.
Sec. 3008. Payment adjustment for conditions acquired in hospitals.

Part II – National Strategy to Improve Health Care Quality
Sec. 3011. National strategy.
Sec. 3012. Interagency Working Group on Health Care Quality.
Sec. 3013. Quality measure development.
Sec. 3014. Quality measurement.
Sec. 3015. Data collection; public reporting.

Part III – Encouraging Development of New Patient Care Models
Sec. 3021. Establishment of Center for Medicare and Medicaid Innovation within CMS.
Sec. 3022. Medicare shared savings program.
Sec. 3023. National pilot program on payment bundling.
Sec. 3024. Independence at home demonstration program.

Sec. 3025. Hospital readmissions reduction program.
Sec. 3026. Community-Based Care Transitions Program.
Sec. 3027. Extension of gainsharing demonstration.

Subtitle B – Improving Medicare for Patients and Providers
Part I – Ensuring Beneficiary Access to Physician Care and Other Services
Sec. 3101. Increase in the physician payment update.
Sec. 3102. Extension of the work geographic index floor and revisions to the practice expense geographic adjustment under the Medicare physician fee schedule.
Sec. 3103. Extension of exceptions process for Medicare therapy caps.
Sec. 3104. Extension of payment for technical component of certain physician pathology services.
Sec. 3105. Extension of ambulance add-ons.
Sec. 3106. Extension of certain payment rules for long-term care hospital services and of moratorium on the establishment of certain hospitals and facilities.
Sec. 3107. Extension of physician fee schedule mental health add-on.
Sec. 3108. Permitting physician assistants to order post-Hospital extended care services.
Sec. 3109. Exemption of certain pharmacies from accreditation requirements.
Sec. 3110. Part B special enrollment period for disabled TRICARE beneficiaries.
Sec. 3111. Payment for bone density tests.
Sec. 3112. Revision to the Medicare Improvement Fund.

Sec. 3113. Treatment of certain complex diagnostic laboratory tests.

Sec. 3114. Improved access for certified nurse-midwife services.

Part II – Rural Protections

Sec. 3121. Extension of outpatient hold harmless provision.

Sec. 3122. Extension of Medicare reasonable costs payments for certain clinical diagnostic laboratory tests furnished to hospital patients in certain rural areas.

Sec. 3123. Extension of the Rural Community Hospital Demonstration Program.

Sec. 3124. Extension of the Medicare-dependent hospital (MDH) program.

Sec. 3125. Temporary improvements to the Medicare inpatient hospital payment adjustment for low-volume hospitals.

Sec. 3126. Improvements to the demonstration project on community health integration models in certain rural counties.

Sec. 3127. MedPAC study on adequacy of Medicare payments for health care providers serving in rural areas.

Sec. 3128. Technical correction related to critical access hospital services.

Sec. 3129. Extension of and revisions to Medicare rural hospital flexibility program.

Part III – Improving Payment Accuracy

Sec. 3131. Payment adjustments for home health care.

Sec. 3132. Hospice reform.

Sec. 3133. Improvement to Medicare disproportionate share hospital (DSH) payments.

Sec. 3134. Misvalued codes under the physician fee schedule.
Sec. 3135. Modification of equipment utilization factor for advanced imaging services.
Sec. 3136. Revision of payment for power-driven wheelchairs.
Sec. 3137. Hospital wage index improvement.
Sec. 3138. Treatment of certain cancer hospitals.
Sec. 3139. Payment for biosimilar biological products.
Sec. 3140. Medicare hospice concurrent care demonstration program.
Sec. 3141. Application of budget neutrality on a national basis in the calculation of the Medicare hospital wage index floor.
Sec. 3142. HHS study on urban Medicare-dependent hospitals.
Sec. 3143. Protecting home health benefits.

Subtitle C – Provisions Relating to Part C
Sec. 3201. Medicare Advantage payment.
Sec. 3202. Benefit protection and simplification.
Sec. 3203. Application of coding intensity adjustment during MA payment transition.
Sec. 3204. Simplification of annual beneficiary election periods.
Sec. 3205. Extension for specialized MA plans for special needs individuals.
Sec. 3206. Extension of reasonable cost contracts.
Sec. 3207. Technical correction to MA private fee-for-service plans.
Sec. 3208. Making senior housing facility demonstration permanent.
Sec. 3209. Authority to deny plan bids.
Sec. 3210. Development of new standards for certain Medigap plans.

Subtitle D – Medicare Part D Improvements for Prescription Drug Plans and MA-PD Plans

Sec. 3301. Medicare coverage gap discount program.

Sec. 3302. Improvement in determination of Medicare part D low-income benchmark premium.

Sec. 3303. Voluntary de minimis policy for subsidy eligible individuals under prescription drug plans and MA-PD plans.

Sec. 3304. Special rule for widows and widowers regarding eligibility for low-income assistance.

Sec. 3305. Improved information for subsidy eligible individuals reassigned to prescription drug plans and MA-PD plans.

Sec. 3306. Funding outreach and assistance for low-income programs.

Sec. 3307. Improving formulary requirements for prescription drug plans and MA-PD plans with respect to certain categories or classes of drugs.

Sec. 3308. Reducing part D premium subsidy for high-income beneficiaries.

Sec. 3309. Elimination of cost sharing for certain dual eligible individuals.

Sec. 3310. Reducing wasteful dispensing of outpatient prescription drugs in long-term care facilities under prescription drug plans and MA-PD plans.

Sec. 3311. Improved Medicare prescription drug plan and MA-PD plan complaint system.

Sec. 3312. Uniform exceptions and appeals process for prescription drug plans and MA-PD plans.

Sec. 3313. Office of the Inspector General studies and reports.

Sec. 3314. Including costs incurred by AIDS drug assistance programs and Indian Health Service

in providing prescription drugs toward the annual out-of-pocket threshold under part D.

Sec. 3315. Immediate reduction in coverage gap in 2010.

Subtitle E – Ensuring Medicare Sustainability

Sec. 3401. Revision of certain market basket updates and incorporation of productivity improvements into market basket updates that do not already incorporate such improvements.

Sec. 3402. Temporary adjustment to the calculation of part B premiums.

Sec. 3403. Independent Medicare Advisory Board.

Subtitle F – Health Care Quality Improvements

Sec. 3501. Health care delivery system research; Quality improvement technical assistance.

Sec. 3502. Establishing community health teams to support the patient-centered medical home.

Sec. 3503. Medication management services in treatment of chronic disease.

Sec. 3504. Design and implementation of regionalized systems for emergency care.

Sec. 3505. Trauma care centers and service availability.

Sec. 3506. Program to facilitate shared decisionmaking.

Sec. 3507. Presentation of prescription drug benefit and risk information.

Sec. 3508. Demonstration program to integrate quality improvement and patient safety training into clinical education of health professionals.

Sec. 3509. Improving women's health.

Sec. 3510. Patient navigator program.

Sec. 3511. Authorization of appropriations.

Subtitle G – Protecting and Improving Guaranteed Medicare Benefits

Sec. 3601. Protecting and improving guaranteed Medicare benefits.

Sec. 3602. No cuts in guaranteed benefits.

TITLE IV – PREVENTION OF CHRONIC DISEASE AND IMPROVING PUBLIC HEALTH

Subtitle A – Modernizing Disease Prevention and Public Health Systems

Sec. 4001. National Prevention, Health Promotion and Public Health Council.

Sec. 4002. Prevention and Public Health Fund.

Sec. 4003. Clinical and community preventive services.

Sec. 4004. Education and outreach campaign regarding preventive benefits.

Subtitle B – Increasing Access to Clinical Preventive Services

Sec. 4101. School-based health centers.

Sec. 4102. Oral healthcare prevention activities.

Sec. 4103. Medicare coverage of annual wellness visit providing a personalized prevention plan.

Sec. 4104. Removal of barriers to preventive services in Medicare.

Sec. 4105. Evidence-based coverage of preventive services in Medicare.

Sec. 4106. Improving access to preventive services for eligible adults in Medicaid.

Sec. 4107. Coverage of comprehensive tobacco cessation services for pregnant women in Medicaid.

Sec. 4108. Incentives for prevention of chronic diseases in Medicaid.

Subtitle C – Creating Healthier Communities
Sec. 4201. Community transformation grants.
Sec. 4202. Healthy aging, living well; evaluation of community-based prevention and wellness programs for Medicare beneficiaries.
Sec. 4203. Removing barriers and improving access to wellness for individuals with disabilities.
Sec. 4204. Immunizations.
Sec. 4205. Nutrition labeling of standard menu items at chain restaurants.
Sec. 4206. Demonstration project concerning individualized wellness plan.
Sec. 4207. Reasonable break time for nursing mothers.

Subtitle D – Support for Prevention and Public Health Innovation
Sec. 4301. Research on optimizing the delivery of public health services.
Sec. 4302. Understanding health disparities: data collection and analysis.
Sec. 4303. CDC and employer-based wellness programs.
Sec. 4304. Epidemiology-Laboratory Capacity Grants.
Sec. 4305. Advancing research and treatment for pain care management.
Sec. 4306. Funding for Childhood Obesity Demonstration Project.

Subtitle E – Miscellaneous Provisions
Sec. 4401. Sense of the Senate concerning CBO scoring.
Sec. 4402. Effectiveness of Federal health and wellness initiatives.

TITLE V – HEALTH CARE WORKFORCE
Subtitle A – Purpose and Definitions
Sec. 5001. Purpose.
Sec. 5002. Definitions.

Subtitle B – Innovations in the Health Care Workforce
Sec. 5101. National health care workforce commission.
Sec. 5102. State health care workforce development grants.
Sec. 5103. Health care workforce assessment.

Subtitle C – Increasing the Supply of the Health Care Workforce
Sec. 5201. Federally supported student loan funds.
Sec. 5202. Nursing student loan program.
Sec. 5203. Health care workforce loan repayment programs.
Sec. 5204. Public health workforce recruitment and retention programs.
Sec. 5205. Allied health workforce recruitment and retention programs.
Sec. 5206. Grants for State and local programs.
Sec. 5207. Funding for National Health Service Corps.
Sec. 5208. Nurse-managed health clinics.
Sec. 5209. Elimination of cap on commissioned corps.
Sec. 5210. Establishing a Ready Reserve Corps.

Subtitle D – Enhancing Health Care Workforce Education and Training
Sec. 5301. Training in family medicine, general internal medicine, general pediatrics, and physician assistantship.

Sec. 5302. Training opportunities for direct care workers.
Sec. 5303. Training in general, pediatric, and public health dentistry.
Sec. 5304. Alternative dental health care providers demonstration project.
Sec. 5305. Geriatric education and training; career awards; comprehensive geriatric education.
Sec. 5306. Mental and behavioral health education and training grants.
Sec. 5307. Cultural competency, prevention, and public health and individuals with disabilities training.
Sec. 5308. Advanced nursing education grants.
Sec. 5309. Nurse education, practice, and retention grants.
Sec. 5310. Loan repayment and scholarship program.
Sec. 5311. Nurse faculty loan program.
Sec. 5312. Authorization of appropriations for parts B through D of title VIII.
Sec. 5313. Grants to promote the community health workforce.
Sec. 5314. Fellowship training in public health.
Sec. 5315. United States Public Health Sciences Track.

Subtitle E – Supporting the Existing Health Care Workforce
Sec. 5401. Centers of excellence.
Sec. 5402. Health care professionals training for diversity.
Sec. 5403. Interdisciplinary, community-based linkages.
Sec. 5404. Workforce diversity grants.
Sec. 5405. Primary care extension program.

Subtitle F – Strengthening Primary Care and Other Workforce Improvements

Sec. 5501. Expanding access to primary care services and general surgery services.

Sec. 5502. Medicare Federally qualified health center improvements.

Sec. 5503. Distribution of additional residency positions.

Sec. 5504. Counting resident time in nonprovider settings.

Sec. 5505. Rules for counting resident time for didactic and scholarly activities and other activities.

Sec. 5506. Preservation of resident cap positions from closed hospitals.

Sec. 5507. Demonstration projects To address health professions workforce needs; extension of family-to-family health information centers.

Sec. 5508. Increasing teaching capacity.

Sec. 5509. Graduate nurse education demonstration.

Subtitle G – Improving Access to Health Care Services

Sec. 5601. Spending for Federally Qualified Health Centers (FQHCs).

Sec. 5602. Negotiated rulemaking for development of methodology and criteria for designating medically underserved populations and health professions shortage areas.

Sec. 5603. Reauthorization of the Wakefield Emergency Medical Services for Children Program.

Sec. 5604. Co-locating primary and specialty care in community-based mental health settings.

Sec. 5605. Key National indicators.

Subtitle H – General Provisions
Sec. 5701. Reports.

TITLE VI – TRANSPARENCY AND PROGRAM INTEGRITY
Subtitle A – Physician Ownership and Other Transparency
Sec. 6001. Limitation on Medicare exception to the prohibition on certain physician referrals for hospitals.
Sec. 6002. Transparency reports and reporting of physician ownership or investment interests.
Sec. 6003. Disclosure requirements for in-office ancillary services exception to the prohibition on physician self-referral for certain imaging services.
Sec. 6004. Prescription drug sample transparency.
Sec. 6005. Pharmacy benefit managers transparency requirements.

Subtitle B – Nursing Home Transparency and Improvement
Part I – Improving Transparency of Information
Sec. 6101. Required disclosure of ownership and additional disclosable parties information.
Sec. 6102. Accountability requirements for skilled nursing facilities and nursing facilities.
Sec. 6103. Nursing home compare Medicare website.
Sec. 6104. Reporting of expenditures.
Sec. 6105. Standardized complaint form.
Sec. 6106. Ensuring staffing accountability.
Sec. 6107. GAO study and report on Five-Star Quality Rating System.

Part II – Targeting Enforcement
Sec. 6111. Civil money penalties.

Sec. 6112. National independent monitor demonstration project.
Sec. 6113. Notification of facility closure.
Sec. 6114. National demonstration projects on culture change and use of information technology in nursing homes.

Part III – Improving Staff Training
Sec. 6121. Dementia and abuse prevention training.

Subtitle C – Nationwide Program for National and State Background Checks on Direct Patient Access Employees of Long-term Care Facilities and Providers
Sec. 6201. Nationwide program for National and State background checks on direct patient access employees of long-term care facilities and providers.

Subtitle D – Patient-Centered Outcomes Research
Sec. 6301. Patient-Centered Outcomes Research.
Sec. 6302. Federal coordinating council for comparative effectiveness research.

Subtitle E – Medicare, Medicaid, and CHIP Program Integrity Provisions
Sec. 6401. Provider screening and other enrollment requirements under Medicare, Medicaid, and CHIP.
Sec. 6402. Enhanced Medicare and Medicaid program integrity provisions.
Sec. 6403. Elimination of duplication between the Healthcare Integrity and Protection Data Bank and the National Practitioner Data Bank.
Sec. 6404. Maximum period for submission of Medicare claims reduced to not more than 12 months.

Sec. 6405. Physicians who order items or services required to be Medicare enrolled physicians or eligible professionals.

Sec. 6406. Requirement for physicians to provide documentation on referrals to programs at high risk of waste and abuse.

Sec. 6407. Face to face encounter with patient required before physicians may certify eligibility for home health services or durable medical equipment under Medicare.

Sec. 6408. Enhanced penalties.

Sec. 6409. Medicare self-referral disclosure protocol.

Sec. 6410. Adjustments to the Medicare durable medical equipment, prosthetics, orthotics, and supplies competitive acquisition program.

Sec. 6411. Expansion of the Recovery Audit Contractor (RAC) program.

Subtitle F – Additional Medicaid Program Integrity Provisions

Sec. 6501. Termination of provider participation under Medicaid if terminated under Medicare or other State plan.

Sec. 6502. Medicaid exclusion from participation relating to certain ownership, control, and management affiliations.

Sec. 6503. Billing agents, clearinghouses, or other alternate payees required to register under Medicaid.

Sec. 6504. Requirement to report expanded set of data elements under MMIS to detect fraud and abuse.

Sec. 6505. Prohibition on payments to institutions or entities located outside of the United States.

Sec. 6506. Overpayments.

Sec. 6507. Mandatory State use of national correct coding initiative.
Sec. 6508. General effective date.

Subtitle G – Additional Program Integrity Provisions
Sec. 6601. Prohibition on false statements and representations.
Sec. 6602. Clarifying definition.
Sec. 6603. Development of model uniform report form.
Sec. 6604. Applicability of State law to combat fraud and abuse.
Sec. 6605. Enabling the Department of Labor to issue administrative summary cease and desist orders and summary seizures orders against plans that are in financially hazardous condition.
Sec. 6606. MEWA plan registration with Department of Labor.
Sec. 6607. Permitting evidentiary privilege and confidential communications.

Subtitle H – Elder Justice Act
Sec. 6701. Short title of subtitle.
Sec. 6702. Definitions.
Sec. 6703. Elder Justice.

Subtitle I – Sense of the Senate Regarding Medical Malpractice
Sec. 6801. Sense of the Senate regarding medical malpractice.

TITLE VII – IMPROVING ACCESS TO INNOVATIVE MEDICAL THERAPIES
Subtitle A – Biologics Price Competition and Innovation
Sec. 7001. Short title.

Sec. 7002. Approval pathway for biosimilar biological products.
Sec. 7003. Savings.

Subtitle B – More Affordable Medicines for Children and Underserved Communities
Sec. 7101. Expanded participation in 340B program.
Sec. 7102. Improvements to 340B program integrity.
Sec. 7103. GAO study to make recommendations on improving the 340B program.

TITLE VIII – CLASS ACT
Sec. 8001. Short title of title.
Sec. 8002. Establishment of national voluntary insurance program for purchasing community living assistance services and support.

TITLE IX – REVENUE PROVISIONS
Subtitle A – Revenue Offset Provisions
Sec. 9001. Excise tax on high cost employer-sponsored health coverage.
Sec. 9002. Inclusion of cost of employer-sponsored health coverage on W-2.
Sec. 9003. Distributions for medicine qualified only if for prescribed drug or insulin.
Sec. 9004. Increase in additional tax on distributions from HSAs and Archer MSAs not used for qualified medical expenses.
Sec. 9005. Limitation on health flexible spending arrangements under cafeteria plans.
Sec. 9006. Expansion of information reporting requirements.
Sec. 9007. Additional requirements for charitable hospitals.

Sec. 9008. Imposition of annual fee on branded prescription pharmaceutical manufacturers and importers.
Sec. 9009. Imposition of annual fee on medical device manufacturers and importers.
Sec. 9010. Imposition of annual fee on health insurance providers.
Sec. 9011. Study and report of effect on veterans health care.
Sec. 9012. Elimination of deduction for expenses allocable to Medicare Part D subsidy.
Sec. 9013. Modification of itemized deduction for medical expenses.
Sec. 9014. Limitation on excessive remuneration paid by certain health insurance providers.
Sec. 9015. Additional hospital insurance tax on high-income taxpayers.
Sec. 9016. Modification of section 833 treatment of certain health organizations.
Sec. 9017. Excise tax on elective cosmetic medical procedures.

Subtitle B – Other Provisions
Sec. 9021. Exclusion of health benefits provided by Indian tribal governments.
Sec. 9022. Establishment of simple cafeteria plans for small businesses.
Sec. 9023. Qualifying therapeutic discovery project credit.

TITLE X – STRENGTHENING QUALITY, AFFORDABLE HEALTH CARE FOR ALL AMERICANS
Subtitle A – Provisions Relating to Title I
Sec. 10101. Amendments to subtitle A.
Sec. 10102. Amendments to subtitle B.

Sec. 10103. Amendments to subtitle C.
Sec. 10104. Amendments to subtitle D.
Sec. 10105. Amendments to subtitle E.
Sec. 10106. Amendments to subtitle F.
Sec. 10107. Amendments to subtitle G.
Sec. 10108. Free choice vouchers.
Sec. 10109. Development of standards for financial and administrative transactions.

Subtitle B – Provisions Relating to Title II
Part I – Medicaid and CHIP
Sec. 10201. Amendments to the Social Security Act and title II of this Act.
Sec. 10202. Incentives for States to offer home and community-based services as a long-term care alternative to nursing homes.
Sec. 10203. Extension of funding for CHIP through fiscal year 2015 and other CHIP-related provisions.

Part II – Support for Pregnant and Parenting Teens and Women
Sec. 10211. Definitions.
Sec. 10212. Establishment of pregnancy assistance fund.
Sec. 10213. Permissible uses of Fund.
Sec. 10214. Appropriations.

Part III – Indian Health Care Improvement
Sec. 10221. Indian health care improvement.

Subtitle C – Provisions Relating to Title III
Sec. 10301. Plans for a Value-Based purchasing program for ambulatory surgical centers.
Sec. 10302. Revision to national strategy for quality improvement in health care.
Sec. 10303. Development of outcome measures.

Sec. 10304. Selection of efficiency measures.
Sec. 10305. Data collection; public reporting.
Sec. 10306. Improvements under the Center for Medicare and Medicaid Innovation.
Sec. 10307. Improvements to the Medicare shared savings program.
Sec. 10308. Revisions to national pilot program on payment bundling.
Sec. 10309. Revisions to hospital readmissions reduction program.
Sec. 10310. Repeal of physician payment update.
Sec. 10311. Revisions to extension of ambulance add-ons.
Sec. 10312. Certain payment rules for long-term care hospital services and moratorium on the establishment of certain hospitals and facilities.
Sec. 10313. Revisions to the extension for the rural community hospital demonstration program.
Sec. 10314. Adjustment to low-volume hospital provision.
Sec. 10315. Revisions to home health care provisions.
Sec. 10316. Medicare DSH.
Sec. 10317. Revisions to extension of section 508 hospital provisions.
Sec. 10318. Revisions to transitional extra benefits under Medicare Advantage.
Sec. 10319. Revisions to market basket adjustments.
Sec. 10320. Expansion of the scope of, and additional improvements to, the Independent Medicare Advisory Board.
Sec. 10321. Revision to community health teams.
Sec. 10322. Quality reporting for psychiatric hospitals.

Sec. 10323. Medicare coverage for individuals exposed to environmental health hazards.
Sec. 10324. Protections for frontier States.
Sec. 10325. Revision to skilled nursing facility prospective payment system.
Sec. 10326. Pilot testing pay-for-performance programs for certain Medicare providers.
Sec. 10327. Improvements to the physician quality reporting system.
Sec. 10328. Improvement in part D medication therapy management (MTM) programs.
Sec. 10329. Developing methodology to assess health plan value.
Sec. 10330. Modernizing computer and data systems of the Centers for Medicare & Medicaid services to support improvements in care delivery.
Sec. 10331. Public reporting of performance information.
Sec. 10332. Availability of Medicare data for performance measurement.
Sec. 10333. Community-based collaborative care networks.
Sec. 10334. Minority health.
Sec. 10335. Technical correction to the hospital value-based purchasing program.
Sec. 10336. GAO study and report on Medicare beneficiary access to high-quality dialysis services.

Subtitle D – Provisions Relating to Title IV
Sec. 10401. Amendments to subtitle A.
Sec. 10402. Amendments to subtitle B.
Sec. 10403. Amendments to subtitle C.
Sec. 10404. Amendments to subtitle D.
Sec. 10405. Amendments to subtitle E.
Sec. 10406. Amendment relating to waiving coinsurance for preventive services.

Sec. 10407. Better diabetes care.
Sec. 10408. Grants for small businesses to provide comprehensive workplace wellness programs.
Sec. 10409. Cures Acceleration Network.
Sec. 10410. Centers of Excellence for Depression.
Sec. 10411. Programs relating to congenital heart disease.
Sec. 10412. Automated Defibrillation in Adam's Memory Act.
Sec. 10413. Young women's breast health awareness and support of young women diagnosed with breast cancer.

Subtitle E – Provisions Relating to Title V
Sec. 10501. Amendments to the Public Health Service Act, the Social Security Act, and title V of this Act.
Sec. 10502. Infrastructure to Expand Access to Care.
Sec. 10503. Community Health Centers and the National Health Service Corps Fund.
Sec. 10504. Demonstration project to provide access to affordable care.

Subtitle F – Provisions Relating to Title VI
Sec. 10601. Revisions to limitation on Medicare exception to the prohibition on certain physician referrals for hospitals.
Sec. 10602. Clarifications to patient-centered outcomes research.
Sec. 10603. Striking provisions relating to individual provider application fees.
Sec. 10604. Technical correction to section 6405.
Sec. 10605. Certain other providers permitted to conduct face to face encounter for home health services.

Sec. 10606. Health care fraud enforcement.
Sec. 10607. State demonstration programs to evaluate alternatives to current medical tort litigation.
Sec. 10608. Extension of medical malpractice coverage to free clinics.
Sec. 10609. Labeling changes.

Subtitle G – Provisions Relating to Title VIII
Sec. 10801. Provisions relating to title VIII.

Subtitle H – Provisions Relating to Title IX
Sec. 10901. Modifications to excise tax on high cost employer-sponsored health coverage.
Sec. 10902. Inflation adjustment of limitation on health flexible spending arrangements under cafeteria plans.
Sec. 10903. Modification of limitation on charges by charitable hospitals.
Sec. 10904. Modification of annual fee on medical device manufacturers and importers.
Sec. 10905. Modification of annual fee on health insurance providers.
Sec. 10906. Modifications to additional hospital insurance tax on high-income taxpayers.
Sec. 10907. Excise tax on indoor tanning services in lieu of elective cosmetic medical procedures.
Sec. 10908. Exclusion for assistance provided to participants in State student loan repayment programs for certain health professionals.
Sec. 10909. Expansion of adoption credit and adoption assistance programs.

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF VIRGINIA
Richmond Division

COMMONWEALTH OF VIRGINIA, ex rel. Kenneth T. Cuccinelli, II, in his official capacity as Attorney General of Virginia,	)	
Plaintiff,	)	
v.	)	Civil Action No. 3:10-cv-00188-HEH
KATHLEEN SEBELIUS, Secretary of the Department of Health and Human Services, in her official capacity,	)	
Defendant.	)	

MEMORANDUM IN OPPOSITION TO PLAINTIFF'S MOTION FOR SUMMARY JUDGMENT

(Filed Sep. 23, 2010)

* * *

[Following a discussion of remedies and severability, and noting the following if the court "were to rule in Virginia's favor at the merits stage":]

Under these principles, some provisions of the Act plainly cannot survive. As defendants repeatedly have made clear – in passages that Virginia inflates beyond their obvious meaning – insurance industry

reforms in Section 1201 such as guaranteed-issue and community-rating will stand or fall with the minimum coverage provision. As noted, these reforms within Section 1201 protect the 57 million Americans with pre-existing medical conditions by requiring insurers to issue policies to those persons at non-discriminatory rates. As Virginia correctly recognizes (Pl.'s Mem. 26-27), these regulations of the interstate insurance market must be coupled with the minimum coverage provision in order to be effective. Absent a minimum coverage provision, the guaranteed-issue and community-rating reforms in Section 1201 would cause many to drop coverage, leading to a spiral of increased premiums and a shrinking risk pool – the insurance market will "implode." Because Congress would not have intended this result, these reforms cannot be severed from the minimum coverage provision.[14]

* * *

[14] This link establishes that the minimum coverage provision is constitutional, however, as Congress has the power to enact measures to ensure the vitality of its broader regulations of interstate commerce. *See Dean*, 670 F. Supp. 2d at 460.

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF VIRGINIA
Richmond Division

COMMONWEALTH OF VIRGINIA, EX REL. KENNETH T. CUCCINELLI, II	Civil Action No. 3:10 CV 188
v.	
KATHLEEN SEBELIUS	October 18, 2010

COMPLETE TRANSCRIPT OF MOTIONS BEFORE THE HONORABLE HENRY E. HUDSON UNITED STATES DISTRICT COURT JUDGE

APPEARANCES:

Kenneth T. Cuccinelli, II, Esquire
E. Duncan Getchell, Jr., Esquire
Wesley G. Russell, Jr., Esquire
Stephen R. McCullough, Esquire
OFFICE OF THE ATTORNEY GENERAL
900 East Main Street
Richmond, Virginia 23219

Counsel on behalf of the Plaintiff

Ian Gershengorn, Esquire
Joel McElvain, Esquire
Sheila M. Lieber, Esquire
Jonathan Hambrick, Esquire
20 Massachusetts Avenue NW
Room 7332
Washington, DC 20001

Counsel on behalf of the Defendant

KRISTA M. LISCIO, RMR
OFFICIAL COURT REPORTER
UNITED STATES DISTRICT COURT

* * *

[88] So what the government has quote, unquote, conceded, is that there are a number of specific provisions that the – particularly 2701, 2702, 2704, which are the guaranteed issues, they are the parts of the Bill that really impose the most core commerce – reforms on insurance companies; the preexisting conditions, lifetime caps, and things of that nature. But those are the provisions really for the reasons that we've said the two are necessary, those really couldn't stand. That they would create exactly the kind of market implosion that we talked about, and we're consistent about that.

* * *

[89] MR. GERSHENGORN: Your Honor, the only ones that we think necessarily fall are those – the three that I mentioned. The others, there are – it's clear that the Medicaid one doesn't fall. I think that the others would require a further analysis that I don't think, quite frankly, either side has done in the briefing before this Court.

* * *

IN THE
UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF VIRGINIA
RICHMOND DIVISION

COMMONWEALTH OF VIRGINIA, EX REL. KENNETH T. CUCCINELLI, II, in his official capacity as Attorney General of Virginia, Plaintiff,	**Civil Action No. 3:10cv188**
v.	
KATHLEEN SEBELIUS, Secretary of the Department of Health and Human Services, in her official capacity Defendant.	

PLAINTIFF'S MEMORANDUM IN SUPPORT OF MOTION FOR SUMMARY JUDGMENT

(Filed Sep. 3, 2010)

KENNETH T. CUCCINELLI, II
Attorney General
of Virginia

CHARLES E. JAMES, JR.
Chief Deputy Attorney
General

E. DUNCAN GETCHELL, JR.
Virginia State Bar
No. 14156
Solicitor General
dgetchell@oag.state.va.us
Counsel of Record

WESLEY G. RUSSELL, JR.
Virginia State Bar
No. 38756
Deputy Attorney
General
wrussell@oag.state.va.us

STEPHEN R. MCCULLOUGH
Virginia State Bar
No. 41699
Senior Appellate Counsel
smccullough@oag.state.va.us

OFFICE OF THE
ATTORNEY GENERAL
900 East Main Street
Richmond, Virginia
23219
Telephone: (804) 786-2436
Facsimile: (804) 786-1991

Counsel for the
Commonwealth of
Virginia

September 3, 2010

* * *

II. COMMONWEALTH'S STATEMENT OF UNDISPUTED FACTS

Pursuant to Local Rule 56(b), the Commonwealth submits the following statement of facts believed to be undisputed.

1. At the 2010 Regular Session of the Virginia General Assembly, Virginia Code § 38.2-3430.1:1, the Health Care Freedom Act, was enacted with the assent of the Governor. (Doc. 1 at 1 ¶ 1; Doc. 87 at 1 ¶ 2).

2. That statute provides:

   > No resident of this Commonwealth, regardless of whether he has or is

> eligible for health insurance coverage under any policy or program provided by or through his employer, or a plan sponsored by the Commonwealth or the federal government, shall be required to obtain or maintain a policy of individual insurance coverage except as required by a court or the Department of Social Services where an individual is named a party in a judicial or administrative proceeding. No provision of this title shall render a resident of this Commonwealth liable for any penalty, assessment, fee, or fine as a result of his failure to procure or obtain health insurance coverage. This section shall not apply to individuals voluntarily applying for coverage under a state-administered program pursuant to Title XIX or Title XXI of the Social Security Act. This section shall not apply to students being required by an institution of higher education to obtain and maintain health insurance as a condition of enrollment. Nothing herein shall impair the rights of persons to privately contract for health insurance for family members or former family members.

(Doc. 1 ¶ 3; Doc. 87 at 1 ¶ 3).

3. Subsequently, PPACA was enacted into law. 124 Stat. 119, 1029 (2010).

4. Congress expressly stated that the mandate and penalty were essential elements of the act without which the statutory scheme cannot function. (PPACA § 1501; § 10106).

5. The Federal act contains no severability clause. (PPACA *passim*).

6. Kathleen Sebelius in her official capacity is presently responsible for administering PPACA. (PPACA *passim*; Doc. 1 at 3 ¶ 8; Doc. 87 at 2 ¶ 8).

7. Before the act was passed, the Senate Finance Committee asked the Congressional Research Service to opine on the constitutionality of the individual mandate. The Service replied: "Whether such a requirement would be constitutional under the Commerce Clause is perhaps the most challenging question posed by such a proposal, as it is a novel issue whether Congress may use this Clause to require an individual to purchase a good or a service." Cong. Research Serv. *Requiring Individuals to Obtain Health Insurance: A Constitutional Analysis 3* (2009). Similar advice was given by the Congressional Budget Office in connection with the Clinton administration health care initiative. *See The Budgetary Treatment of an Individual Mandate to Buy Health Insurance*, CBO Memorandum, at 1 (August 1994), *available at* http://www.cbo.gov/ftpdocs/48xx/doc4816/doc38.pdf ("A

mandate requiring all individuals to purchase health insurance would be an unprecedented form of federal action. The government has never required people to buy any good or service as a condition of lawful residence in the United States. An individual mandate would have two features that, in combination, would make it unique. First, it would impose a duty on individuals as members of society. Second, it would require people to purchase a specific service that would be heavily regulated by the federal government.").

8. PPACA passed the Senate on a party line vote with considerable minority protest. *See, e.g.*, Cong. Rec. Nov. 2, 2009 S10965 (no bill); *id.*, S10973 (bill being drafted behind closed doors); *id.*, Nov. 17, 2009 S11397 ("The majority leader has had in his office a secret bill that he is working on that we have not seen yet."); *id.*, S11401 (No Child Left Behind got 7 weeks on the floor – "We don't even have a bill yet"); *id.*, Nov. 19, 2009 S11819 (bill is a shell, not the real one); *id.*, Nov. 30, 2009 S11982 (Official debate begins); *id.*, Dec. 3, 2009 S12263 (bill has been on floor for 3 days and never has been in committee); *id.*, Dec. 5, 2009 S12487 (majority will not slow down); *id.*, Dec. 11, 2009 S12981 ("We are going to have three Democratic amendments and one Republican amendment voted on, and the Democrats wrote the bill"); *id.*, S12977 (votes on amendments blocked; "In the meantime, this backroom deal that is being cut, which we

haven't seen – supposedly it has been sent to the CBO to see what it would cost"); *id.*, Dec. 14, 2009 S13144 ("There is somewhere in this building a hidden bill, known as the manager's amendment, which is being drafted by one or two or three people . . . "); *id.*, Dec. 17, 2009 S13344 (bill is not being given the legislative time it deserves because the polls show a majority of Americans are against it and thus it has become a political nightmare for the majority who now simply want to ram it through before Christmas even though "no one outside the majority leader's conference room has seen it yet"); *id.*, Dec. 22, 2009 S13756 (Nebraska deal); *Id.*, Mar. 10, 2010 H1307 (reconciliation being used because bill could not re-pass the Senate).

9. In contrast, the General Assembly of Virginia passed several identical versions of the Virginia Health Care Freedom Act ("HCFA") on a bi-partisan basis, with margins as high as 90 to 3 in the House of Delegates and 25 to 15 in the Senate. *See* SB 417 Individual health insurance coverage; resident of State shall not be required to obtain a policy, *available at* http://leg.state.va.us/cgi-bin/legp504.exe?101+sum+SB417. At the time of passage of the HCFA, the Virginia House of Delegates contained 59 Republicans, 39 Democrats and 2 Independents, while the Virginia Senate contained 22 Democrats and 18 Republicans. See attached Declarations of Bruce Jamerson and Susan Schaar.

10. Although the mandate does not take effect for several years, PPACA imposes immediate and continuing burdens on Virginia. (Aff. Sec'y Hazel) (Doc. 28).

* * *

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF VIRGINIA
Richmond Division

COMMONWEALTH OF VIRGINIA, ex rel. Kenneth T. Cuccinelli, II, in his official capacity as Attorney General of Virginia, Plaintiff, v. KATHLEEN SEBELIUS, Secretary of the Department of Health and Human Services, in her official capacity Defendant.	Civil Action No. 3:10-cv-00188-HEH

MEMORANDUM IN OPPOSITION TO PLAINTIFF'S MOTION FOR SUMMARY JUDGMENT

(Filed Sep. 23, 2010)

* * *

Response to Plaintiff's Statement of Material Facts

1. The Secretary does not dispute that the Virginia legislature has enacted Virginia Code § 38.2-3430.1:1, but disputes that the statute is more than declaratory. In any event, the statute is not material. State law cannot revoke powers granted by the Constitution to Congress. *Raich*, 545 U.S. at 29 ("Just

as state acquiescence to federal regulation cannot expand the bounds of the Commerce Clause, so too state action cannot circumscribe Congress' plenary commerce power.") (internal citations omitted); *see also Wickard v. Filburn*, 317 U.S. 111, 124 (1942) ("no form of state activity can constitutionally thwart the regulatory power granted by the commerce clause to Congress").

2. The Secretary does not dispute that Virginia has accurately quoted the text of Virginia Code § 38.2-3430.1:1. For the reasons stated in paragraph 1 above, this fact is not material.

3. The Secretary does not dispute that Congress has enacted the Patient Protection and Affordable Care Act ("ACA"), Pub. L. No. 111-148, 124 Stat. 119 (2010).

4. The Secretary disputes this statement, as it mischaracterizes the cited material. The Secretary does not dispute the findings that Congress actually made. Congress found that, without a minimum coverage provision, the insurance market reforms in the Act, such as the ban on denying coverage to persons because of pre-existing conditions or charging more on the basis of those conditions, would amplify existing incentives for individuals to "wait to purchase health insurance until they needed care," thereby shifting greater costs onto third parties. ACA, §§ 1501(a)(2)(I), 10106(a). Congress accordingly found that the minimum coverage provision "is an essential part of [the Act's] larger regulation of economic activity,"

and that its absence "would undercut Federal regulation of the health insurance market." *Id.* §§ 1501(a)(2)(H), 10106(a). Congress did not find that the minimum coverage provision was essential to every element of the ACA.

5. The Secretary does not dispute that no single provision of the ACA explicitly addresses severability. This statement is not material, however, for the reasons discussed below at pages 29-33.

6. The Secretary disputes this statement. She is responsible for the administration of a number of the provisions of the ACA. However, the Secretary of the Treasury administers the minimum coverage provision at issue in this suit. ACA, § 1501(b) (adding 26 U.S.C. § 5000A(g)); *see* 26 U.S.C. § 7801(a). The Secretary of the Treasury is not a party in this suit.

7. The Secretary disputes this statement. The Senate Finance Committee asked the Congressional Research Service ("CRS") to prepare a report addressing the constitutionality of the minimum coverage provision, and CRS concluded in its report that Congress could use its power under the General Welfare Clause to enact the minimum coverage provision. The Secretary disputes that the minimum coverage provision is "unprecedented." This statement, in any event, is not material.

8. The Secretary does not dispute that the Senate adopted the ACA by a vote of 60-39, and the House of Representatives adopted it by a vote of 219-212. This fact, however, is not material. The

constitutionality of a statute adopted by a majority vote of both Houses of Congress and signed by the President does not turn on the partisan affiliations of the proponents or the opponents of the statute.

9. The Secretary does not dispute that the Virginia legislature has enacted Virginia Code § 38.2-3430.1:1. This fact is not material, however, nor are the party affiliations of the Virginia legislators who voted for and against this legislative statement of position, for the reasons set forth in paragraphs 1 and 8 above.

10. The Secretary disputes this statement. The minimum coverage provision does not impose any burdens or obligations on Virginia as a state. Any actions that Virginia may undertake as a state pursuant to other provisions of the ACA are irrelevant to its standing to challenge the minimum coverage provision. "[A] plaintiff must establish that he has standing to challenge *each provision* of [a statute] by showing that he was injured by application of *those provisions*." *Covenant Media of S.C. v. City of N. Charleston*, 493 F.3d 421, 430 (4th Cir. 2007) (emphasis added).

* * *

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF VIRGINIA
Richmond Division

COMMONWEALTH OF VIRGINIA, ex rel. Kenneth T. Cuccinelli, II, in his official capacity as Attorney General of Virginia, Plaintiff, v. KATHLEEN SEBELIUS, Secretary of the Department of Health and Human Services, in her official capacity Defendant.	Civil Action No. 3:10-cv-00188-HEH

MEMORANDUM IN SUPPORT OF
DEFENDANT'S MOTION FOR
SUMMARY JUDGMENT

(Filed Sep. 3, 2010)

* * *

Statement of Undisputed Material Facts

1. Congress gave detailed consideration to the structure of the reforms of the interstate health insurance market that it enacted in the ACA, as shown by the more than fifty hearings that it held on the subject in the 110th and 111th Congresses alone. *See* H.R. REP. NO. 111-443, pt. II, at 954-68 (2010) (Ex. 1). The following facts well exceed a rational

basis for Congress to conclude that it had authority under Article I of the Constitution to enact the ACA, and in particular, the minimum coverage provision:[1]

I. The Widespread Lack of Insurance Coverage in the Interstate Market

2. In 2009, the United States spent more than 17 percent of its gross domestic product on health care. Pub. L. No. 111-148 ("ACA"), §§ 1501(a)(2)(B), 10106(a).[2]

3. Notwithstanding these expenditures, 45 million people – an estimated 15% of the population – went without health insurance for some portion of 2009. Absent the new statute, that number would have climbed to 54 million by 2019. CONG. BUDGET OFFICE ("CBO"), KEY ISSUES IN ANALYZING MAJOR HEALTH INSURANCE PROPOSALS 11 (Dec. 2008)

---

[1] This is Court does not independently review the facts underlying Congress's conclusion that it had the Article I authority to enact a statute. The Court's task instead is to determine "whether a 'rational basis' exists" for Congress to so conclude. *Gonzales v. Raich*, 545 U.S. 1, 22 (2005) (quoting *United States v. Lopez*, 514 U.S. 549, 557 (1995)). The "legislative facts" underlying the conclusion are accordingly not subject to courtroom proof. *See* FED. R. EVID. 201 advisory committee's note; *see also Maersk Line Ltd. v. Care*, 271 F. Supp. 2d 818, 821 n.1 (E.D. Va. 2003).

[2] Although Congress is not required to set forth particularized findings of an activity's effect on interstate commerce, when, as here, it does so, courts "will consider congressional findings in [their] analysis." *Raich*, 545 U.S. at 21.

[hereinafter KEY ISSUES] (Ex. 2); *see also* CBO, THE LONG-TERM BUDGET OUTLOOK 21-22 (June 2009) (Ex. 3).

4. The pervasive lack of insurance has occured [sic] because "[t]he market for health insurance . . . is not a well-functioning market." COUNCIL OF ECONOMIC ADVISERS ("CEA"), THE ECONOMIC CASE FOR HEALTH CARE REFORM 16 (June 2009) (submitted into the record for *The Economic Case for Health Reform: Hearing Before the H. Comm. on the Budget*, 111th Cong. 5 (2009)) [hereinafter THE ECONOMIC CASE] (Ex. 4). There are several features that are unique to the national health insurance market that have caused that market to fail, and that have prevented many from obtaining needed insurance.

5. Health insurance is a unique market. With rare exceptions, individuals cannot make a personal choice to eliminate the current or potential future consumption of health care services. Nor can individuals reliably predict whether they or their families will need health care. They may go without health care for many years, then unexpectedly suffer a debilitating injury or disease and suddenly incur high or even catastrophic health care costs. *See* J.P. Ruger, *The Moral Foundations of Health Insurance*, 100 Q.J. MED. 53, 54-55 (2007) (Ex. 5). This combination of universal need and unavoidable uncertainty gave rise to the private health insurance industry, as well as federal programs such as Medicare and Medicaid, and federal regulation under statutes such as ERISA, COBRA, EMTALA, and

HIPAA. In this market, everyone is a participant because everyone, in one way or another, is faced with managing the financial risks associated with unpredictable future health care costs. Katherine Baicker & Amitabh Chandra, *Myths and Misconceptions About U.S. Health Insurance*, 27 HEALTH AFFAIRS w533, w534 (2008) (Ex. 6); Jonathan Gruber, PUBLIC FINANCE AND PUBLIC POLICY 442-28 (3d ed. 2009) (Ex. 7).

6. When a person does fall ill, he is effectively assured of at least a basic level of care, without regard to his insured status. Under the Emergency Medical Treatment and Labor Act, 42 U.S.C. § 1395dd, for example, hospitals that participate in Medicare and offer emergency services are required to stabilize any patient who arrives, regardless of whether he has insurance or otherwise can pay for that care. CBO, KEY ISSUES, at 13. In addition, most hospitals are nonprofit organizations that "have some obligation to provide care for free or for a minimal charge to members of their community who could not afford it otherwise." *Id.* For-profit hospitals "also provide such charity or reduced-price care." *Id.*

7. Because of the availability of this backstop of free care, many persons have an incentive not to obtain insurance, knowing that they will not bear the full cost of their decision to attempt to pay for their health care needs out-of-pocket. THE ECONOMIC CASE, at 17. *See also* Bradley Herring, *The Effect of the Availability of Charity Care to the Uninsured on the*

Demand for Private Health Insurance, 24 J. OF HEALTH ECON. 225, 226 (2005) (Ex. 8).

8. Most individuals make economic decisions whether to attempt to pay for their anticipated health care needs through insurance, or to attempt (often unsuccessfully) to pay out-of-pocket. In making these decisions, individuals weigh the cost of insurance against the cost of their potential out-of-pocket expenses. *See* Mark V. Pauly, *Risks and Benefits in Health Care: The View from Economics*, 26 HEALTH AFFAIRS 653, 657-58 (2007) (Ex. 9).

9. Individuals regularly revisit these economic decisions whether to purchase insurance or attempt to finance their health care needs through another manner. Movement in and out of insured status is "very fluid." Of those who are uninsured at some point in a given year, about 63% have coverage at some other point during the same year. CBO, HOW MANY PEOPLE LACK HEALTH INSURANCE AND FOR HOW LONG?, 4, 9 (May 2003) (Ex. 10); *see also* KEY ISSUES, at 11.

10. Empirical studies document the universal need for, and use of, health care services. Far from being inactive bystanders, the vast majority of the population – even of the uninsured population – has participated in the health care market by receiving medical services. *See* June E. O'Neill & Dave M. O'Neill, *Who Are the Uninsured?: An Analysis of America's Uninsured Population, Their Characteristics, and Their Health*, 20-22 (2009) (Ex.

11) (94% of even long-term uninsured have received some level of medical care); see also National Center for Health Statistics, HEALTH, UNITED STATES, 2009 at 318 (2010) (for 2007, 62.6% of uninsured at a given point in time had at least one visit to a doctor or emergency room within the year) (Ex. 12).

11. The health insurance market is also unique due to the extreme distribution of risk within the market. The large majority of medical expenditures are incurred by a small percentage of the population. "About 20 percent of the population accounts for 80 percent of health spending," with "the sickest one-percent accounting for nearly one-quarter of health expenditures." H.R. REP. NO. 111-443, pt. II, at 990 (internal quotation omitted).

II. Insurance Industry Incentives to Deny Coverage Under Prior Law

12. Because of the extremely uneven distribution of risk, insurers seek to exclude those they deem most likely to incur expenses. *47 Million and Counting: Why the Health Care Marketplace Is Broken: Hearing Before the S. Comm. on Finance*, 110th Cong. 51-52 (2008) (statement of Mark Hall, Professor of Law and Public Health, Wake Forest Univ.) (Ex. 13). That is, they adopt practices designed – albeit imperfectly – to "cherry-pick healthy people and to weed out those who are not as healthy." H.R. REP. NO. 111-443, pt. II, at 990 (internal quotation omitted).

13. These practices include medical underwriting, or the individualized review of an insurance applicant's health status. This practice is costly, resulting in administrative fees that are responsible for 26 to 30 percent of the cost of premiums in the individual and small group markets. ACA, §§ 1501(a)(2)(J), 10106(a). Medical underwriting yields substantially higher risk-adjusted premiums or outright denial of insurance coverage for an estimated one-fifth of applicants, a portion of the population that is most in need of coverage. CBO, KEY ISSUES, at 81.

14. These practices also include: denial of coverage for those with pre-existing conditions, even minor ones; exclusion of pre-existing conditions from coverage; higher, and often unaffordable, premiums based on the insured's medical history; and rescission of policies after claims are made. *Id.* These practices are often harsh and unfair for consumers, in that "many who need coverage cannot obtain it, and many more who have some type of insurance may not have adequate coverage to meet their health care needs." *Health Reform in the 21st Century: Insurance Market Reforms: Hearing Before the H. Comm. on Ways and Means,* 111th Cong. 53 (2009) (Linda Blumberg, Senior Fellow, Urban Inst.) (Ex. 14). Insurers often revoke coverage even for relatively minor pre-existing conditions. *Consumer Choices and Transparency in the Health Insurance Industry: Hearing Before the S. Comm. on Commerce, Science & Transp.,* 111th Cong.

29-30 (2009) (Karen Pollitz, Research Professor, Georgetown Univ. Health Policy Inst.) (Ex. 15).

15. More than 57 million Americans have some pre-existing medical condition, and thus, absent reform, risk denial or rescission of insurance coverage. Families USA Foundation, *Health Reform: Help for Americans with Pre-Existing Conditions*, at 2 (2010) (Ex. 16). Given that insurers operate in interstate commerce and can gauge their participation in state markets based on the nature of regulation there, *see* Sara Rosenbaum, *Can States Pick Up the Health Reform Torch?*, 362 NEW ENGL. J. MED. e29, at 3 (2010) (Ex. 17), Congress concluded that there was a need for regulatory protection at a national level.

III. The Substantial Economic Effects of the Lack of Insurance Coverage

16. Aside from these issues of cost and consumer protection, Congress found that the widespread inability of Americans to obtain affordable coverage, or to obtain coverage at all, also has significant additional economic effects. For example, 62 percent of all personal bankruptcies are caused in part by medical expenses. ACA, §§ 1501(a)(2)(G), 10106(a).

17. Moreover, the uncertainty that many Americans experience as to whether they can obtain coverage also constrains the labor market. The phenomenon of "job lock," in which employees avoid changing employment because they fear losing

coverage, is widespread. Employees are 25% less likely to change jobs if they are at risk of losing health insurance coverage in doing so. THE ECONOMIC CASE at 36-37; *see also* Gruber, PUBLIC FINANCE AND PUBLIC POLICY at 431.

18. Insurance industry reform to guarantee coverage would alleviate "job lock" and increase wages, in the aggregate, by more than $10 billion annually, or 0.2% of the gross domestic product. THE ECONOMIC CASE at 36-37.

19. One result of industry practices that deny, impede, or raise the cost of insurance coverage is that many millions of people are uninsured. In the aggregate, the uninsured shift much of the cost of their care onto other persons. The uninsured continue to receive health care services, but empirical evidence shows they pay only a small portion of the cost. For example, one estimate found that hospitals collect from uninsured patients on average only 10% of the cost of their care. Mark A. Hall & Carl E. Schneider, *Patients as Consumers: Courts, Contracts, and the New Medical Marketplace*, 106 MICH. L. REV. 643, 665 n.121 (2008) (Ex. 18).

20. This phenomenon is not limited to the uninsured with the lowest incomes. On average, uninsured persons with incomes of more than 300% of the federal poverty level pay for less than one half of the cost of the medical care that they receive. Herring, 24 J. OF HEALTH ECON. at 229-30.

21. The costs of "uncompensated care" for the uninsured fall on other participants in the health care market. In the aggregate, that cost shifting amounted to $43 billion in 2008, about 5 percent of overall hospital revenues. CBO, KEY ISSUES, at 114. Indeed, this figure may underestimate the cost shifting. One study estimated that the uninsured in 2008 collectively received $86 billion in care during the time they lacked coverage, including $56 billion in services for which they did not pay, either in the form of bad debts or in the form of reduced-cost or free charitable care. Jack Hadley et al., *Covering the Uninsured in 2008: Current Costs, Sources of Payment, and Incremental Costs* 2008, 27 HEALTH AFFAIRS w399, w401 (2008) (Ex. 19); CBO, KEY ISSUES, at 114; *see also* CBO, NONPROFIT HOSPITALS AND THE PROVISION OF COMMUNITY BENEFITS 1-2 (2006) (Ex. 20).

22. Public funds subsidize these costs. For example, through Disproportionate Share Hospital payments, the federal government paid for tens of billions of dollars in uncompensated care for the uninsured in 2008 alone. Congress determined that preventing or reducing cost-shifting would lower these public subsidies. H.R. REP. NO. 111-443, pt. II, at 983; *see also* THE ECONOMIC CASE, at 8.

23. The remaining costs in the first instance fall on health care providers, which in turn "pass on the cost to private insurers, which pass on the cost to families." ACA, § 1501(a)(2)(F), 10106(a). This cost-shifting effectively creates a "hidden tax" reflected in

fees charged by health care providers and premiums charged by insurers. CEA, ECONOMIC REPORT OF THE PRESIDENT 187 (Feb. 2010) (Ex. 21); *see also* H.R. REP. NO. 111-443, pt. II, at 985 (2010); S. REP. NO.111-89, at 2 (2009) (Ex. 22).

24. When premiums increase as a result of cost-shifting by the uninsured, more people who see themselves as healthy make the economic calculation not to buy, or to drop, coverage. For many, this economic calculation leads them to wait to obtain coverage until they grow older, when they anticipate greater health care needs. *See* CBO, KEY ISSUES at 12 (percentage of uninsured older adults in 2007 was roughly half the percentage of uninsured younger adults). *See also* M.E. Martinez & R.A. Cohen, *Health Insurance Coverage: Early Release of Estimates From the National Health Interview Survey, January-June 2009*, National Center for Health Statistics, at 2 (Dec. 2009) (Ex. 23); U.S. Census Bureau, Census Population Survey, *Annual Social and Economic Supplement* (2009) (Table H101, data on coverage status by age) (available at www.census.gov/hhes/www/cpstables/032009/health/h01_001.htm) (Ex. 24).

25. This self-selection further narrows the risk pool, which, in turn, further increases the price of coverage for the insured. The result is a self-reinforcing "premium spiral." *Health Reform in the 21st Century: Insurance Market Reforms* at 118-19 (2009) (American Academy of Actuaries); see also H.R. REP. NO. 111-443, pt. II, at 985.

26. This premium spiral particularly hurts small employers, due to their relative lack of bargaining power. *See* H.R. REP. NO. 111-443, pt. II, at 986-88; THE ECONOMIC CASE at 37-38; *see also 47 Million and Counting* at 36 (Raymond Arth, Nat'l Small Business Ass'n) (noting need for insurance reform and minimum coverage provision to stem rise of small business premiums).

IV. The Reforms of the Affordable Care Act

27. To address the economic effects of these market failures, as well as to protect consumers, the Patient Protection and Affordable Care Act comprehensively "regulates activity that is commercial and economic in nature: economic and financial decisions about how and when health care is paid for, and when health insurance is purchased." ACA, §§ 1501(a)(2)(A), 10106(a). The comprehensive reform has five main components.

28. First, to address inflated premiums in the individual and small-business insurance market, Congress established health insurance Exchanges "as an organized and transparent marketplace for the purchase of health insurance where individuals and employees (phased-in over time) can shop and compare health insurance options." H.R. REP. NO. 111-443, pt. II, at 976 (internal quotation omitted). Exchanges review premiums, coordinate participation and enrollment in health plans, implement

procedures to certify qualified health plans, and educate consumers. ACA, § 1311.

29. Second, the Act builds on the existing system of employer-based health insurance, in which most individuals receive coverage as part of employee compensation. *See* KEY ISSUES, at 4-5. It creates tax incentives for small businesses to purchase health insurance for employees, and imposes penalties on certain large businesses that do not provide employees adequate coverage. ACA, §§ 1421, 1513.

30. Third, the Act provides financial assistance to support the purchase of coverage for a large portion of the uninsured population. As Congress understood, nearly two-thirds of the uninsured are in families with income less than 200 percent of the federal poverty level, H.R. REP. NO. 111-443, pt. II, at 978; *see also* KEY ISSUES, at 27, while 4 percent of those with income greater than 400 percent of the poverty level are uninsured. KEY ISSUES, at 11. The Act reduces this gap by providing premium tax credits for individuals and families with income between 100 and 400 percent of the federal poverty line, ACA, §§ 1401-02, and expands eligibility for Medicaid to individuals with income below 133 percent of the federal poverty level beginning in 2014. *Id.* § 2001.

31. Fourth, the Act removes barriers to insurance coverage. As noted above, a variety of insurance industry practices have increased premiums for or denied coverage to those with the greatest health care

needs. Most significantly, the Act bars insurers from refusing to cover individuals with pre-existing medical conditions. ACA, § 1201. The Act also prevents insurers from rescinding coverage for any reason other than fraud or intentional misrepresentation, or declining to renew coverage based on health status. *Id.* §§ 1001, 1201. Further, with limited exceptions, the Act prohibits insurers from charging higher premiums on the basis of the insured's prior medical history. *Id.* § 1201. And it prohibits caps on the coverage available to a policyholder in a given year or over a lifetime. *Id.* §§ 1001, 10101(a).

32. Finally, the Act requires that all Americans, with specified exceptions, maintain a minimum level of health insurance coverage, or pay a penalty. ACA, §§ 1501, 10106 (as amended by Health Care and Education Reconciliation Act of 2010, Pub. L. No. 111-152, § 1002, 124 Stat. 1029, 1032).

V. The Minimum Coverage Provision as an Essential Part of the Act's Insurance Industry Reforms

33. Congress found that this minimum coverage provision "is an essential part of this larger regulation of economic activity," and that its absence "would undercut Federal regulation of the health insurance market." *Id.* §§1501(a)(2)(H), 10106(a). That judgment rested on a number of Congressional findings. Congress found that, by "significantly

reducing the number of the uninsured, the requirement, together with the other provisions of this Act, will lower health insurance premiums." *Id.* §§ 1501(a)(2)(F), 10106(a). Conversely, and importantly, Congress also found that, without the minimum coverage provision, the reforms in the Act, such as the ban on denying coverage or charging more based on pre-existing conditions, would amplify existing incentives for individuals to "wait to purchase health insurance until they needed care," thereby further shifting costs onto third parties. *Id.* §§ 1501(a)(2)(I), 10106(a). Congress thus determined that the minimum coverage provision "is essential to creating effective health insurance markets in which improved health insurance products that are guaranteed issue and do not exclude coverage of pre-existing conditions can be sold." *Id.*

34. These Congressional findings are amply supported. The new "guaranteed issue" and "community rating" requirements under Section 1201 of the Act ensure that all Americans can obtain coverage subject to no coverage limits and despite the pre-existing conditions they may have at that time. ACA, § 1201. Because these new insurance regulations would allow individuals to "wait to purchase health insurance until they needed care," *id.*, §§ 1501(a)(2)(I), 10106(a), they would increase the incentives for individuals to "make an economic and financial decision to forego health insurance coverage" until their health care needs become substantial, *id.* §§ 1501(a)(2)(A), 10106(a).

35. Individuals who would make that decision would take advantage of the ACA's reforms by joining a coverage pool maintained in the interim through premiums paid by other market participants. Without a minimum coverage provision, this market timing would increase the costs of uncompensated care and the premiums for the insured pool, creating pressures that would "inexorably drive [the health insurance] market into extinction." *Health Reform in the 21st Century: Insurance Market Reforms*, at 13 (Uwe Reinhardt, Ph.D., Professor of Political Economy, Economics, and Public Affairs, Princeton University); *see also* William H. Frist, *An Individual Mandate for Health Insurance Would Benefit All*, U.S. NEWS & WORLD REPORT (Sept. 28, 2009) (politics.usnews.com/opinion/articles/2009/09/28/frist-an-individual-mandate-for-health-insurance-would-benefit-all.html) (Ex. 25).

36. This danger is not merely theoretical, but instead is borne out in the experience of states that have attempted "guaranteed issue" and "community rating" reforms without an accompanying minimum coverage provision. After New Jersey enacted a similar reform, its individual health insurance market experienced higher premiums and decreased coverage. *See* Alan C. Monheit, et al., *Community Rating and Sustainable Individual Health Insurance Markets in New Jersey*, 23 HEALTH AFFAIRS 167, 168 (2004) (Ex. 26) (describing potential for "adverse selection death spiral" in a market with guaranteed issue); *see also Health Reform in the 21st Century: Insurance Market Reforms* at 101-02 (Dr. Reinhardt).

37. Likewise, after New York enacted a similar reform, "the market for individual health insurance in New York has nearly disappeared." Stephen T. Parente & Tarren Bragdon, *Healthier Choice: An Examination of Market-Based Reforms for New York's Uninsured*, MEDICAL PROGRESS REPORT NO. 10 at i (Manhattan Institute, Sept. 2009) (Ex. 27).

38. In contrast, Massachusetts enacted "guaranteed issue" and "community rating" reforms, coupled with a minimum coverage provision. Its reforms have succeeded. Since 2006, the average individual premium in Massachusetts has decreased by 40%, compared to a 14% *increase* in the national average. Jonathan Gruber, Mass. Inst. of Tech., *The Senate Bill Lowers Non-Group Premiums: Updated for New CBO Estimates*, at 1 (Nov. 27, 2009) (available at www.whitehouse.gov/files/documents/Gruber_Report_4.pdf) (Ex. 28). *See also* Letter from Mitt H. Romney, Governor of Massachusetts, to State Legislature at 1-2 (Apr. 12, 2006) (Ex. 29) (signing statement for Massachusetts bill, noting need for insurance coverage requirement to prevent cost-shifting by the uninsured).

39. In short, "fundamental insurance-market reform is impossible" if the guaranteed issue and community-rating reforms are not coupled with a minimum coverage provision. Jonathan Gruber, *Getting the Facts Straight on Health Care Reform*, 316 NEW ENG. J. OF MED. 2497, 2498 (2009) (Ex. 30). This is because "[a] health insurance market could never survive or even form if people could buy their

insurance on the way to the hospital." *47 Million and Counting*, at 52 (Prof. Hall). Accordingly, Congress found that the minimum coverage provision is "essential" to its broader effort to regulate health insurance industry underwriting practices that have prevented many from obtaining health insurance, ACA, §§ 1501(a)(2)(I), (J), 10106(a).

40. The minimum coverage provision also addresses the unnecessary costs created by the insurance industry's practice of medical underwriting. "By significantly increasing health insurance coverage and the size of purchasing pools, which will increase economies of scale, the requirement, together with the other provisions of this Act, will significantly reduce administrative costs and lower health insurance premiums," and is therefore "essential to creating effective health insurance markets that do not require underwriting and eliminate its associated administrative costs." ACA, §§ 1501(a)(2)(J), 10106(a).

VI. The Revenue-Raising Effect of the Minimum Coverage Provision

41. The CBO projects that the reforms in the Act will reduce the number of uninsured Americans by approximately 32 million by 2019. Letter from Douglas W. Elmendorf, Director, CBO, to the Hon. Nancy Pelosi, Speaker, U.S. House of Representatives 9 (Mar. 20, 2010) (Ex. 31) [hereinafter CBO Letter to Rep. Pelosi].

42. It further projects that the Act's combination of reforms and tax credits will reduce the average premium paid by individuals and families in the individual and small-group markets. *Id.* at 15; CBO, AN ANALYSIS OF HEALTH INSURANCE PREMIUMS UNDER THE PATIENT PROTECTION AND AFFORDABLE CARE ACT 23-25 (Nov. 30, 2009) (Ex. 32).

43. CBO estimates that the interrelated revenue and spending provisions in the Act – specifically taking into account revenue from the minimum coverage provision – will yield net savings to the federal government of more than $100 billion over the next decade. CBO Letter to Rep. Pelosi at 2.

44. In particular, the CBO estimates that the minimum coverage provision would produce about $4 billion in annual revenue once it is fully in effect. CBO Letter to Rep. Pelosi at tbl. 4 at 2.

* * *

IN THE
UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF VIRGINIA

RICHMOND DIVISION

COMMONWEALTH OF VIRGINIA, EX REL. KENNETH T. CUCCINELLI, II, in his official capacity as Attorney General of Virginia,	
Plaintiff,	**Civil Action No. 3:10cv188**
v.	
KATHLEEN SEBELIUS, Secretary of the Department of Health and Human Services, in her official capacity	
Defendant.	

PLAINTIFF'S MEMORANDUM IN OPPOSITION TO THE SECRETARY'S MOTION FOR SUMMARY JUDGMENT

(Filed Sep. 23, 2010)

KENNETH T. CUCCINELLI, II
Attorney General
of Virginia

CHARLES E. JAMES, JR.
Chief Deputy Attorney
General

E. DUNCAN GETCHELL, JR.
Virginia State Bar
No. 14156
Solicitor General
dgetchell@oag.state.va.us
Counsel of Record

WESLEY G. RUSSELL, JR.
Virginia State Bar
No. 38756
Deputy Attorney
General
wrussell@oag.state.va.us

STEPHEN R. MCCULLOUGH
Virginia State Bar
No. 41699
Senior Appellate Counsel
smccullough@oag.state.va.us

OFFICE OF THE
ATTORNEY GENERAL
900 East Main Street
Richmond, Virginia
23219
Telephone: (804) 786-2436
Facsimile: (804) 786-1991

Counsel for the
Commonwealth of
Virginia

September 3, 2010

* * *

II. RESPONSE TO STATEMENT OF FACTS

1. Commonwealth agrees that the alleged facts upon which the Secretary relies are not adjudicative facts. (Doc. 91 at 16 n.1.). As a consequence, disagreements concerning her alleged legislative facts are no bar to summary judgment. The Commonwealth denies that any hearings were held or any reports issued with respect to the Senate bill that passed on Christmas Eve 2009.

2. Commonwealth agrees that reviewing courts "'will consider legislative findings.'" (Doc. 91 at 16 n.1.). However, the secrecy, haste and parliamentary brutality associated with the passage of PPACA

(Doc. 89 at 12-13 ¶ 8) should lead this Court to reject the premise that Congress took a hard look at the basis for its claimed power. The Congressional Research Service had warned that the mandate was unprecedented (Doc. 89 at 12 ¶ 7), and it is doubtful that a majority of those voting for it on a party line division had read the mammoth bill that emerged for their abbreviated consideration.

3-12. Commonwealth denies that sources extraneous to § 1501 of PPACA are "'legislative facts'" in the sense that they compose any part of the legislative history of PPACA. Nor can it be shown that they were before or in the mind of the majorities that passed PPACA. They are also not entitled to deference as information that Congress might have believed to be true under a rational basis test. (Doc. 91 at 16 n.1.) The Commerce Clause rational basis test recognized in *Raich* and *Lopez* should not be confused with the deferential due process rational basis test of *Williamson v. Lee Optical of Okla., Inc.*, 348 U.S. 483, 487-88 (1955). *See United States v. Comstock*, 176 L. Ed. 2d 878, 900-01 (2010) (Kennedy, J., concurring). Rather, the Commerce Clause rational basis test as it relates to the scope of the Commerce Clause asks whether Congress has a rational basis for believing that "respondents' activities, taken in the aggregate, substantially affect interstate commerce." *Raich*, 545 U.S. at 22. Because

there are no activities at issue here, the test is not satisfied and the sources extraneous to PPACA cited in support of the Secretary's argument are legally irrelevant.

13. See responses 2 and 3-12.

14-15. See response to 3-12.

16. See response to 2.

17-22. See response to 3-12.

23. See responses 2 and 3-12.

24-26. See response to 3-12.

27-34. See responses 2 and 3-12. The Commonwealth of Virginia further responds that PPACA speaks for itself with respect to its operative provisions.

35-38. See response to 3-12.

39-40. See response to 27-34.

41. See response to 3-12.

* * *

APPEAL, CLOSED

U.S. District Court
Eastern District of Virginia – (Richmond)
CIVIL DOCKET FOR CASE
#: 3:10-cv-00188-HEH

Commonwealth of Virginia, Ex Rel. Kenneth T. Cuccinelli, II v. Sebelius
Assigned to:
District Judge Henry E. Hudson
Case in other court: USCA, 11-01057
USCA, 11-01058
Cause: 28:1331 Federal Question

Date Filed: 03/23/2010
Date Terminated: 12/13/2010
Jury Demand: None
Nature of Suit: 950 Constitutional – State Statute
Jurisdiction: U.S. Government Defendant

Date Filed	#	Docket Text
03/23/2010	1	COMPLAINT FOR DECLARATORY AND INJUNCTIVE RELIEF against Kathleen Sebelius; filing fee paid $ 350, receipt number 34683007662; filed by Commonwealth of Virginia, Ex Rel. Kenneth T. Cuccinelli, II. (Attachments: # 1 Civil Cover Sheet, # 2 Receipt)(cmcc,) (Entered: 03/23/2010)
03/23/2010	2	Summons Issued as to Kathleen Sebelius, U.S. Attorney and U.S.

		Attorney General. Delivered to counsel. (cmcc,) (Entered: 03/23/2010)
03/23/2010	3	ORDER that the undersigned recuses himself from presiding over this action. It is hereby ORDERED that the Clerk reassign this action to another judge in accord with the standard assignment system. Signed by District Judge Robert E. Payne on 3/23/2010. Copies to counsel.(cmcc,) (Entered: 03/23/2010)
03/23/2010		Case reassigned by standard assignment system to District Judge Henry E. Hudson. District Judge Robert E. Payne no longer assigned to the case. (Reassigned pursuant to Order entered 3/23/2010.) (cmcc,) (Entered: 03/23/2010)
03/25/2010	4	Certificate of Reporting Service by Kathleen Sebelius. Kathleen Sebelius served on 3/23/2010, answer due 5/24/2010. (cmcc,) (Entered: 03/26/2010)
04/30/2010	5	ORDER SETTING PRETRIAL CONFERENCE – Initial Pretrial Conference set for 6/3/2010 at 9:15 AM before District Judge Henry E. Hudson (rpiz) (Entered: 04/30/2010)
04/30/2010	6	SCHEDULING ORDER with Attachment # 1 Pretrial Schedule A (signed by District Judge Henry E. Hudson on 4/30/2010) (rpiz) (Entered: 04/30/2010)

05/05/2010	7	MOTION re 6 Scheduling Order *and Brief in Support Thereof* by Kathleen Sebelius. (Attachments: # 1 Proposed Order)(Hambrick, Jonathan) (Entered: 05/05/2010)
05/05/2010	8	RESPONSE to Motion re 7 MOTION re 6 Scheduling Order *and Brief in Support Thereof* filed by Commonwealth of Virginia, Ex Rel. Kenneth T. Cuccinelli, II. (Attachments: # 1 Proposed Order)(McCullough, Stephen) (Entered: 05/05/2010)
05/05/2010	9	MOTION for Erika Myers to appear Pro hac vice; filing fee waived; by Kathleen Sebelius. (cmcc,) (Entered: 05/06/2010)
05/05/2010	10	MOTION for Joel McElvain to appear Pro hac vice; filing fee waived; by Kathleen Sebelius. (cmcc,) (Entered: 05/06/2010)
05/05/2010	11	MOTION for Sheila Lieber to appear Pro hac vice; filing fee waived; by Kathleen Sebelius. (cmcc,) (Entered: 05/06/2010)
05/05/2010	12	MOTION for Ian Gershengorn to appear Pro hac vice; filing fee waived; by Kathleen Sebelius. (cmcc,) (Entered: 05/06/2010)
05/05/2010		Notice of Correction: Plaintiff counsel has been advised to include the complete signature block on the certificate of service

		on future documents. (cmcc,) (Entered: 05/06/2010)
05/06/2010	13	ORDER granting 7 Defendant's Motion to Modify the Scheduling Order, which the Court will construe as a Motion to Extend Time; the Defendant shall file her Answer or otherwise respond to the Complaint on or before May 24, 2010; if the Defendant files a motion to dismiss the Complaint, the time for filing an Answer shall be deferred until fourteen days after a ruling on that motion to dismiss. Signed by District Judge Henry E. Hudson on 5/6/2010. Copies to counsel. (cmcc,) (Entered: 05/06/2010)
05/07/2010	14	ORDER granting 9 Motion for Pro hac vice. Appointed Erika Myers for Kathleen Sebelius. Signed by District Judge Henry E. Hudson on 5/6/2010. Copies to counsel. (cmcc,) (Entered: 05/07/2010)
05/07/2010	15	ORDER granting 10 Motion for Pro hac vice. Appointed Joel McElvain for Kathleen Sebelius. Signed by District Judge Henry E. Hudson on 5/6/2010. Copies to counsel. (cmcc,) (Entered: 05/07/2010)
05/07/2010	16	ORDER granting 11 Motion for Pro hac vice. Appointed Sheila M. Lieber for Kathleen Sebelius. Signed by District Judge Henry E. Hudson on

		5/6/2010. Copies to counsel. (cmcc,) (Entered: 05/07/2010)
05/07/2010	17	ORDER granting 12 Motion for Pro hac vice. Appointed Ian Gershengorn for Kathleen Sebelius. Signed by District Judge Henry E. Hudson on 5/6/2010. Copies to counsel. (cmcc,) (Entered: 05/07/2010)
05/19/2010	18	MOTION for Leave to File Excess Pages *and Brief in Support Thereof* by Kathleen Sebelius. (Attachments: # 1 Proposed Order)(Hambrick, Jonathan) (Entered: 05/19/2010)
05/19/2010	19	MOTION *to Establish Briefing Schedule* by Kathleen Sebelius. (Hambrick, Jonathan) (Entered: 05/19/2010)
05/19/2010	20	ORDER re: 18 Motion for Leave to Exceed the Page Limitations imposed by Local Civil Rule 7(F); that Defendant is GRANTED leave to file a memorandum in support of her motion to dismiss not to exceed 45 pages; it is FURTHER ORDERED that Plaintiff is GRANTED leave to file a memorandum in opposition to defendant's motion to dismiss not to exceed 45 pages; and it is FURTHER ORDERED that Plaintiff shall file its opposition to Defendant's motion to dismiss on or before 06/07/2010, and defendant shall file her reply brief in support of her motion to

		dismiss on or before 06/22/2010. Signed by District Judge Henry E. Hudson on 05/19/2010. (walk,) (Entered: 05/19/2010)
05/24/2010	21	MOTION to Dismiss by Kathleen Sebelius. (Hambrick, Jonathan) (Entered: 05/24/2010)
05/24/2010	22	Memorandum in Support re 21 MOTION to Dismiss filed by Kathleen Sebelius. (Hambrick, Jonathan) (Entered: 05/24/2010)
06/03/2010	23	ORDER regarding hearing dates for oral argument: 1) Defendant's Motion to Dismiss – July 1, 2010 at 10:00 a.m.; 2) Motions for Summary Judgment – October 18, 2010 at 9:00 a.m.; parties to set briefing schedule for Motions for Summary Judgment, with briefs due fourteen days before the October 18, 2010 hearing date; all amicus filings are due fourteen days before the hearing date which the specific brief addresses. Signed by District Judge Henry E. Hudson on 6/3/2010. Copies to counsel.(cmcc,) (Entered: 06/03/2010)
06/03/2010	24	Minute Entry for proceedings held before District Judge Henry E. Hudson (Court Reporter Liscio, OCR): Initial Pretrial Conference held on 6/3/2010. Hearing on deft's Motion to Dismiss scheduled for

		7/1/2010 at 10:00 a.m. Hearing on Motions for Summary Judgment scheduled for 10/18/2010 at 9:00 a.m.; all briefs due 14 days prior to hearing date. (rpiz) (Entered: 06/03/2010)
06/04/2010	25	TRANSCRIPT of Proceedings held on 6/3/2010, before Judge Henry E. Hudson. Court Reporter/Transcriber Krista Liscio, Telephone number 804 916-2296. Transcript may be viewed at the court public terminal or purchased through the Court Reporter/Transcriber before the deadline for Release of Transcript Restriction. After that date it may be obtained through PACER. Redaction Request due 7/6/2010. Redacted Transcript Deadline set for 8/4/2010. Release of Transcript Restriction set for 9/2/2010.(liscio, krista) (Entered: 06/04/2010)
06/04/2010	26	MOTION for Leave to File Amicus Curiae Brief by Ray Elbert Parker. (Attachments: # 1 Proposed Amicus Brief – Received, # 2 Cover Letter)(cmcc,) (Entered: 06/04/2010)
06/07/2010	27	Notice of Filing of Official Transcript re: 25 Transcript. (cmcc,) (Entered: 06/07/2010) 06/07/2010 28 RESPONSE in Opposition re 21 MOTION to Dismiss filed by Commonwealth of Virginia, Ex Rel. Kenneth T. Cuccinelli, II. (Attachments: # 1

		Affidavit Exhibit A)(Getchell, Earle) (Entered: 06/07/2010)
06/07/2010	29	NOTICE of Appearance by Colby M. May on behalf of American Center for Law & Justice et al. (May, Colby) (Entered: 06/07/2010)
06/07/2010	30	Financial Interest Disclosure Statement (Local Rule 7.1) by American Center for Law & Justice et al.. (May, Colby) (Entered: 06/07/2010)
06/07/2010	31	MOTION for Leave to File *Amici Brief* by American Center for Law & Justice et al.. (Attachments: # 1 Proposed Amici Brief, # 2 Proposed Order)(May, Colby) (Entered: 06/07/2010)
06/08/2010	32	CERTIFICATE of Service re 29 Notice of Appearance by Colby M. May on behalf of American Center for Law & Justice et al. (May, Colby) (Entered: 06/08/2010)
06/08/2010	33	CERTIFICATE of Service re 30 Financial Disclosure Statement by Colby M. May on behalf of American Center for Law & Justice et al. (May, Colby) (Entered: 06/08/2010)
06/09/2010	34	NOTICE of Attorney Withdrawal of Appearance re: Erika L. Myers by Kathleen Sebelius (Hambrick, Jonathan) Modified on 6/9/2010 to edit.(cmcc,). (Entered: 06/09/2010)

06/10/2010	35	ORDER granting 26 Motion for Leave to File Amicus Curiae Brief submitted by Ray Elbert Parker; this Motion is GRANTED and the Clerk is directed to file the pro se movant's Friend of the Court Amicus Curiae Brief. Signed by District Judge Henry E. Hudson on 6/10/2010. Copies to counsel and movant, Ray Elbert Parker. (cmcc,) (Entered: 06/10/2010)
06/10/2010	36	Amicus Curiae Brief ("Friend of the Court Amicus Curiae Brief") entered by Ray Elbert Parker (filed pursuant to Order entered 6/10/2010). (cmcc,) (Entered: 06/10/2010)
06/10/2010	37	ORDER granting 31 Motion for Leave to File a Brief as Amici Curiae supporting Plaintiff's opposition to the Defendant's motion to dismiss, by amici American Center for Law and Justice, United States Representatives Paul Broun, Todd Akin, Rob Bishop, John Boehner, Michael Burgess, Dan Burton, Eric Cantor, Mike Conaway, Mary Fallin, John Fleming, Virginia Foxx, Trent Franks, Scott Garrett, Louie Gohmert, Bob Goodlatte, Jeb Hensarling, Walter Jones, Steve King, Doug Lamborn, Robert Latta, Michael McCaul, Cathy McMorris Rodgers, Jerry Moran, Mike Pence, Jean Schmidt, Lamar Smith, Todd Tiahrt, and Zach Wamp,

		and the Constitutional Committee to Challenge the President and Congress on Health Care; IT IS ORDERED that the motion for leave to file a brief as amici curiae is granted and FURTHER ORDERED that the Clerk shall cause the Proposed Brief to be filed and entered on the docket of the above-captioned matter. Signed by District Judge Henry E. Hudson on 6/10/2010. Copies to counsel and pro se amicus. (cmcc,) (Entered: 06/10/2010)
06/10/2010	38	Response *Amici Brief* filed by Todd Akin, American Center for Law and Justice, Rob Bishop, John Boehner, Paul Broun, Michael Burgess, Dan Burton, Eric Cantor, Mike Conaway, Constitutional Committee to Challenge the President and Congress on Health Care, Mary Fallin, John Fleming, Virginia Foxx, Trent Franks, Scott Garrett, Louie Gohmert, Bob Goodlatte, Jeb Hensarling, Walter Jones, Steve King, Doug Lamborn, Robert Latta, Michael McCaul, Jerry Moran, Mike Pence, Cathy McMorris Rodgers, Jean Schmidt, Lamar Smith, Todd Tiahrt, Zach Wamp. (May, Colby) (Entered: 06/10/2010)
06/15/2010	39	MOTION for Leave to File *Amicus Curiae Brief* by Physician Hospitals of America. (Attachments: # 1 Memorandum of Law in Support,

		# 2 Proposed Brief)(Fender, Matthew) (Entered: 06/15/2010)
06/16/2010		Notice of Correction: Movant counsel will refile document 39 with the signature on the document matching the filing user's login (required by CM/ECF Policies and Procedures); the memorandum in support will be filed as a separate document. (cmcc,) (Entered: 06/16/2010)
06/16/2010	40	MOTION for Leave to File *Amicus Curiae Brief (refiled)* by Physician Hospitals of America. (Attachments: # 1 Proposed Amicus Brief)(Oostdyk, Scott) (Entered: 06/16/2010)
06/16/2010	41	Memorandum in Support re 40 MOTION for Leave to File *Amicus Curiae Brief (refiled)* filed by Physician Hospitals of America. (Oostdyk, Scott) (Entered: 06/16/2010)
06/16/2010	42	ORDER granting a Motion for Leave to Participate as Amicus Curiae (Dk. No. 39) in Opposition to Defendant's Motion to Dismiss; this Motion is GRANTED and Movant is directed to file its Brief of Amicus Curiae Physician Hospitals of America in Opposition to Defendant's Motion to Dismiss. Signed by District Judge Henry E. Hudson on 6/16/2010. Copies to counsel. (cmcc,) (Entered: 06/16/2010)

06/16/2010	43	Memorandum *Amicus Curiae Brief* filed by Physician Hospitals of America. (Oostdyk, Scott) (Entered: 06/16/2010)
06/17/2010	44	MOTION for Leave to File *Amicus Curiae Brief* by Small Business Majority Foundation, Inc.. (Attachments: # 1 Proposed Amicus Brief, # 2 Memorandum of Law in Support, # 3 Financial Disclosure, # 4 Proposed Order, # 5 Certificate of Service)(Young, John) (Entered: 06/17/2010)
06/17/2010	45	MOTION and Memorandum in Support for Leave to File *Brief Amici Curiae* by Center for American Progress, Federal Rights Project National Senior Citizens Law Center. (Attachments: # 1 Brief Amici Curiae, # 2 Proposed Order)(France, Angela) Modified on 6/17/2010 to edit event (cmcc,). (Entered: 06/17/2010)
06/17/2010		Notice of Correction: Movant counsel will refile certain attachments to document 44 as separate documents as required by CM/ECF Policies and Procedures. (cmcc,) (Entered: 06/17/2010)
06/17/2010	46	MOTION for Leave to File *Amicus Curiae Brief* by Washington Legal Foundation. (Attachments: # 1 Exhibit Proposed Amicus Brief,

		# 2 Proposed Order)(Samp, Richard) (Entered: 06/17/2010)
06/17/2010	47	NOTICE of Appearance by Richard Abbott Samp on behalf of Washington Legal Foundation (Samp, Richard) (Entered: 06/17/2010)
06/17/2010	48	Memorandum in Support re 44 MOTION for Leave to File *Amicus Curiae Brief* filed by Small Business Majority Foundation, Inc.. (Young, John) (Entered: 06/17/2010)
06/17/2010	49	Financial Interest Disclosure Statement (Local Rule 7.1) by Small Business Majority Foundation, Inc.. (Young, John) (Entered: 06/17/2010)
06/17/2010	50	CERTIFICATE OF SERVICE by Small Business Majority Foundation, Inc. re 44 MOTION for Leave to File *Amicus Curiae Brief*. (cmcc,) (Entered: 06/17/2010)
06/17/2010	51	ORDER granting a Motion for Leave to File Brief Amici Curiae (Dk. No. 44) in Support of Defendant's Motion to Dismiss; the Motion is GRANTED and Movants are directed to file the Brief Amici Curiae of Small Business Majority Foundation, Inc. and The Main Street Alliance in Support of Defendant's Motion to Dismiss. Signed by District Judge Henry E. Hudson on 6/17/2010. Copies to counsel. (cmcc,) (Entered: 06/17/2010)

06/17/2010	52	MOTION for Leave to Appear Amicus Curiae by Liberty Group. (Attachments: # 1 Proposed Brief, # 2 Proposed Order)(Forest, John) (Entered: 06/17/2010)
06/17/2010	53	NOTICE of Appearance by Andrew Abbott Nicely on behalf of Constitutional Law Professors (Nicely, Andrew) (Entered: 06/17/2010)
06/17/2010	54	MOTION for Leave to File *Amicus Curiae Brief In Support of the Defendant's Motion to Dismiss* by Constitutional Law Professors. (Attachments: # 1 Amicus Brief of Constitutional Law Professors, # 2 Proposed Order)(Nicely, Andrew) (Entered: 06/17/2010)
06/17/2010	55	Response *Brief Amici Curiae* filed by Main Street Alliance, Small Business Majority Foundation, Inc.. (Young, John) (Entered: 06/17/2010)
06/17/2010	56	NOTICE of Appearance by George William Norris, Jr on behalf of Cato Institute (Norris, George) (Entered: 06/17/2010)
06/17/2010	57	Financial Interest Disclosure Statement (Local Rule 7.1) by Cato Institute. (Norris, George) (Entered: 06/17/2010)
06/17/2010	58	MOTION for Leave to File *Amici Memorandum* by Cato Institute, Competitive Enterprise Institute, and Prof. Randy E. Barnett. (Norris,

George) Modified to edit parties (cmcc,). (Entered: 06/17/2010)

06/17/2010 59 Memorandum *of Amici Cato Institute, Competitive Enterprise Institute and Prof. Randy E. Barnett Supporting Plaintiff's Opposition to Defendant's Motion to Dismiss* to 28 Response in Opposition to Motion filed by Cato Institute. (Norris, George) (DOCUMENT RECEIVED, NOT FILED, PENDING LEAVE OF COURT) Modified on 6/17/2010 (cmcc,). (Entered: 06/17/2010)

06/17/2010 60 ORDER granting a Motion for Leave to File Amicus Curiae Brief in Opposition to Defendant's Motion to Dismiss (Dk. No. 46), submitted by the Washington Legal Foundation; the Motion is GRANTED and Movant is DIRECTED to file its Brief of Washington Legal Foundation as Amicus Curiae in Opposition to Defendant's Motion to Dismiss. Signed by District Judge Henry E. Hudson on 6/17/2010. Copies to counsel. (cmcc,) (Entered: 06/17/2010)

06/17/2010 61 ORDER granting Motion for Leave to File Brief of Amici Curiae by the March of Dimes Foundation, et al., in Support of Defendant's Motion to Dismiss (Dk. No. 45); the Motion is GRANTED and Movants are DIRECTED to file their Brief of Amici Curiae in Support of Defendant's

		Motion to Dismiss. Signed by District Judge Henry E. Hudson on 6/17/2010. Copies to counsel. (cmcc,) (Entered: 06/17/2010)
06/17/2010	62	ORDER granting Motion for Leave to Participate as Amicus Curiae in Support of Plaintiff's Opposition to Defendant's Motion to Dismiss (Dk. No. 52), submitted by Liberty Guard; this Motion is GRANTED and Movant is DIRECTED to file its Amicus Curiae Brief in Support of Plaintiff's Opposition to Defendant's Motion to Dismiss. Signed by District Judge Henry E. Hudson on 6/17/2010. Copies to counsel. (cmcc,) (Entered: 06/17/2010)
06/17/2010	63	ORDER granting Motion for Leave to File Amicus Curiae Brief in Support of Defendant's Motion to Dismiss (Dk. No. 54), submitted by constitutional law professors Jack M. Balkin, Gillian E. Metzger, and Trevor W. Morrison; the Motion is GRANTED and Movants are DIRECTED to file their Amicus Curiae Brief of Constitutional Law Professors in Support of Defendant's Motion to Dismiss. Signed by District Judge Henry E. Hudson on 6/17/2010. Copies to counsel. (cmcc,) (Entered: 06/17/2010)
06/17/2010	64	MOTION for Leave to File Supplement for Amicus Curiae Party by Ray Elbert

		Parker. (Attachments: # 1 Proposed Memorandum by Amicus Curiae Party)(cmcc,) (Entered: 06/17/2010)
06/17/2010	65	MOTION for Leave to File *Brief Amicus Curiae* by Landmark Legal Foundation. (Attachments: # 1 Exhibit Brief Amicus Curiae, # 2 Proposed Order)(St. George, Timothy) (Entered: 06/17/2010)
06/18/2010	66	ORDER GRANTING 58 Motion by Movants Cato Institute, et al. for Leave to Participate as Amici Curiae and Movants are DIRECTED to file their Memorandum as Amici Curiae Supporting Plaintiff's Opposition to Defendant's Motion to Dismiss. It is so ORDERED. Signed by District Judge Henry E. Hudson on 06/18/2010. (walk,) (Entered: 06/18/2010)
06/18/2010	67	ORDER GRANTING 64 Motion for Leave to File Supplement Motion for Amicus Curiae Party, submitted by Ray Elbert Parker, Pro Se. The Clerk is DIRECTED to file Petitioner's Brief. It is so ORDERED. Signed by District Judge Henry E. Hudson on 06/18/2010. Copy mailed to Mr. Parker. (walk,) (Entered: 06/18/2010)
06/18/2010	68	Brief Amicus Curiae in Support of Plaintiff's Opposition re: 21 MOTION to Dismiss filed by Liberty Guard. (Forest, John) Modified to edit (cmcc,). (Entered: 06/18/2010)

06/18/2010	69	Brief of Amici Curiae Supporting Plaintiff's Opposition to 21 Defendant's Motion to Dismiss by Cato Institute, Competitive Enterprise Institute and Prof. Randy E. Barnett. (Norris, George) Modified to edit (cmcc,). (Entered: 06/18/2010)
06/18/2010	70	Brief Amicus Curiae in Support to 21 MOTION to Dismiss filed by Constitutional Law Professors Jack M. Balkin, Gillian E. Metzger, and Trevor W. Morrison. (Nicely, Andrew) Modified on 6/22/2010 to edit (cmcc,). (Entered: 06/18/2010)
06/18/2010	71	ORDER GRANTING 65 Motion by Movant Landmark Legal Foundation for Leave to Participate as Amicus Curiae and Movant is DIRECTED to file its Brief Amicus Curiae in Opposition to Defendant's Motion to Dismiss. It is so ORDERED. Signed by District Judge Henry E. Hudson on 06/18/2010. (walk,) (Entered: 06/18/2010)
06/18/2010	72	Brief Amicus Curiae in Opposition re 21 MOTION to Dismiss filed by Washington Legal Foundation. (Samp, Richard) Modified to edit(cmcc,). (Entered: 06/18/2010)
06/18/2010		Notice of Correction re: Document 47; the filing user has been requested to file a separate Certificate of Service

and to link the filing to Document 47. (walk,) (Entered: 06/18/2010)

06/18/2010 73 CERTIFICATE of Service re 47 Notice of Appearance by Richard Abbott Samp on behalf of Washington Legal Foundation (Samp, Richard) (Entered: 06/18/2010)

06/18/2010 74 Brief Amicus Curiae *in Opposition to Motion to Dismiss* filed by Landmark Legal Foundation. (St. George, Timothy) Modified on 6/22/2010 to edit (cmcc,). (Entered: 06/18/2010)

06/18/2010 75 Brief Amici Curiae of The March of Dimes Foundation, The American Association of People with Disabilities, The ARC of the United States, Breast Cancer Action, Families USA, the Family Violence Prevention Fund, Friends of Cancer Research, Mental Health America, National Breast Cancer Coalition, The National Organization for Rare Disorders, The National Partnership for Women & Families, National Patient Advocate Foundation, The National Senior Citizens Law Center, The National Women's Law Center, The Ovarian Cancer National Alliance, Raising Women's Voices for the Health Care We Need, and United Cerebral Palsy, in Support of Motion to Dismiss filed by Center for American Progress, Federal Rights

		Project National Senior Citizens Law Center. (France, Angela) Modified on 6/22/2010 to edit (cmcc,). (Entered: 06/18/2010)
06/18/2010		Notice of Correction: Amici counsel was contacted re: document 59, Amici Brief, regarding CM/ECF Policies and Procedures for documents needing leave of court. No action is necessary at this time. (cmcc,) (Entered: 06/22/2010)
06/21/2010	76	Supplemental Brief by Amicus Curiae Petitioner filed by Ray Elbert Parker (filed pursuant to Order entered 6/18/2010). (cmcc,) (Entered: 06/21/2010)
06/22/2010	77	Reply to 21 MOTION to Dismiss filed by Kathleen Sebelius. (Attachments: # 1 Appendix of Statutory Materials)(Hambrick, Jonathan) (Entered: 06/22/2010)
06/23/2010	78	RESPONSE to Motion re 64 MOTION for Leave to File filed by Commonwealth of Virginia, Ex Rel. Kenneth T. Cuccinelli, II. (Getchell, Earle) (Entered: 06/23/2010)
06/24/2010		Set Deadlines/Hearings as to 21 Motion to Dismiss: Motion Hearing set for 7/1/2010 at 10:00 AM before District Judge Henry E. Hudson (rpiz) (Entered: 06/24/2010)
06/30/2010	79	Amicus Curiae "Reply to Plaintiff's Memorandum of June 23, 2010 in

		Opposition to Dismiss Without Prejudice or Alternatively, for a Change of Venue" filed by Ray Elbert Parker. (cmcc,) (Entered: 06/30/2010)
07/01/2010	80	Minute Entry for proceedings held before District Judge Henry E. Hudson (Court Reporter Liscio, OCR): Motion Hearing held on 7/1/2010 re 21 Motion to Dismiss filed by Kathleen Sebelius. Argument heard. Motion taken under advisement by Court; Memorandum Opinion to enter. (rpiz) (Entered: 07/02/2010)
07/08/2010	81	TRANSCRIPT of Proceedings held on July 1, 2010, before Judge Henry E. Hudson. Court Reporter/Transcriber Krista Liscio, Telephone number 804 916-2296. Transcript may be viewed at the court public terminal or purchased through the Court Reporter/Transcriber. Redaction Request due 8/9/2010. Redacted Transcript Deadline set for 9/7/2010. (liscio, krista) (Entered: 07/08/2010)
07/08/2010	82	Notice of Filing of Official Transcript re 81 Transcript. (cmcc,) (Entered: 07/08/2010)
07/09/2010	83	Amicus Curiae Post Trial Memorandum in Support of Opposition to Defendant's Motion to Dismiss filed by Ray Elbert Parker. (cmcc,) (Entered: 07/12/2010)

08/02/2010	84	MEMORANDUM OPINION. Signed by District Judge Henry E. Hudson on 8/2/2010. Copies to counsel of record.(cmcc,) (Entered: 08/02/2010)
08/02/2010	85	ORDER regarding Defendant's Motion to Dismiss (Dk. No. 21), filed May 24, 2010; for reasons stated in the accompanying Memorandum Opinion, the Defendant's Motion to Dismiss is DENIED. Signed by District Judge Henry E. Hudson on 8/2/2010. Copies to counsel of record. (cmcc,) (Entered: 08/02/2010)
08/10/2010	86	CONSENT ORDER on the briefing schedule for the Motions for Summary Judgment to be filed by the parties; consistent with the Court's June 3, 2010 Order, the parties have conferred and agreed on such a schedule and accordingly it is ORDERED, AJUDGED and DECREED by the Court (see Order for details). Signed by District Judge Henry E. Hudson on 8/10/2010. Copies to counsel.(cmcc,) (Entered: 08/10/2010)
08/16/2010	87	ANSWER to 1 Complaint, by Kathleen Sebelius.(Hambrick, Jonathan) (Entered: 08/16/2010)
09/03/2010	88	MOTION for Summary Judgment by Commonwealth of Virginia, Ex Rel. Kenneth T. Cuccinelli, II. (Getchell, Earle) (Entered: 09/03/2010)

09/03/2010	89	Memorandum in Support re 88 MOTION for Summary Judgment filed by Commonwealth of Virginia, Ex Rel. Kenneth T. Cuccinelli, II. (Attachments: # 1 Affidavit, # 2 Affidavit)(Getchell, Earle) (Entered: 09/03/2010)
09/03/2010	90	MOTION for Summary Judgment by Kathleen Sebelius. (Hambrick, Jonathan) (Entered: 09/03/2010) 09/03/2010 91 Memorandum in Support re 90 MOTION for Summary Judgment filed by Kathleen Sebelius. (Attachments: # 1 Appendix of Exhibits)(Hambrick, Jonathan) (Entered: 09/03/2010) Jonathan) (Entered: 09/03/2010)
09/03/2010	91	Memorandum in Support re 90 MOTION for Summary Judgment filed by Kathleen Sebelius. (Attachments: # 1 Appendix of Exhibits)(Hambrick, Jonathan) (Entered: 09/03/2010)
09/07/2010		Set Deadlines/Hearings as to 88 Motion for Summary Judgment by Commonwealth of Virginia and 90 Motion for Summary Judgment by Kathleen Sebelius: Motions Hearing set for 10/18/2010 at 9:00 AM before District Judge Henry E. Hudson (rpiz) (Entered: 09/07/2010)
09/17/2010	92	MOTION ("Optional") for Leave to File Amicus Brief by W. Spencer

		Connerat, III. (cmcc,) (Entered: 09/17/2010)
09/21/2010	93	ORDER granting 92 Optional Motion for Leave to File Amicus Brief by W. Spencer Connerat, III; the Clerk is directed to file Movant's Optional Motion for Leave to File Amicus Brief as Movant's Brief as Amicus Curiae Supporting Plaintiff. Signed by District Judge Henry E. Hudson on 9/21/2010. Copies to counsel and Connerat. (cmcc,) (Entered: 09/21/2010)
09/21/2010	94	Amicus Brief in Support of Plaintiff filed by W. Spencer Connerat, III (filed pursuant to Order entered 9/21/2010). (cmcc,) (Entered: 09/21/2010)
09/23/2010	95	Memorandum in Opposition re 90 MOTION for Summary Judgment filed by Commonwealth of Virginia, Ex Rel. Kenneth T. Cuccinelli, II. (Getchell, Earle) (Entered: 09/23/2010)
09/23/2010	96	Opposition to 88 MOTION for Summary Judgment filed by Kathleen Sebelius. (Hambrick, Jonathan) (Entered: 09/23/2010)
09/30/2010	97	NOTICE of Appearance by Patrick Michael McSweeney on behalf of Randy E. Barnett, Cato Institute, Competitive Enterprise Institute (McSweeney, Patrick) (Entered: 09/30/2010)

09/30/2010	98	NOTICE of Appearance by Patrick Michael McSweeney on behalf of Steven J. Willis (McSweeney, Patrick) (Entered: 09/30/2010)
09/30/2010		Notice of Correction: Local counsel for Pacific Legal Foundation has been advised to file notice of appearance. (cmcc,) (Entered: 10/01/2010)
09/30/2010	99	MOTION for Timothy Sandefur to appear Pro hac vice by Pacific Legal Foundation. (Attachments: # 1 Receipt)(cmcc,) (Entered: 10/01/2010)
09/30/2010	100	MOTION for Luke Anthony Wake to appear Pro hac vice by Pacific Legal Foundation. (Attachments: # 1 Receipt)(cmcc,) (Entered: 10/01/2010)
10/01/2010	101	MOTION for Leave to File *BRIEF IN SUPPORT OF DEFENDANTS MOTION FOR SUMMARY JUDGMENT* by Young Invincibles. (Attachments: # 1 Proposed Order Proposed Order, # 2 Exhibit Amicus Brief) (Walter, Brett) (Entered: 10/01/2010)
10/01/2010	102	MOTION for Leave to File *Amicus Curiae Memorandum in Support of Plaintiff's Motion for Summary Judgment and Opposing Defendant's Motion for Summary Judgment* by Randy E. Barnett, Cato Institute, Competitive Enterprise Institute. (Attachments: # 1 Proposed Memorandum

		Supporting Plaintiff's Motion for Summary Judgment and Opposing Defendant's Motion for Summary Judgment, # 2 Proposed Order)(McSweeney, Patrick) (Entered: 10/01/2010)
10/01/2010	103	ORDER granting a Motion for Leave to File Brief of Amicus Curiae Young Invincibles, supporting Defendant's Motion for Summary Judgment (Dk. No. 101) ; ORDERED that the motion for leave to file a brief as amicus curiae is granted and FURTHER ORDERED that the Clerk shall cause the Proposed Brief to be filed and entered. Signed by District Judge Henry E. Hudson on 10/1/2010. Copies to counsel. (cmcc,) (Entered: 10/01/2010)
10/01/2010	104	Brief Amicus Curiae in Support of Defendant's Motion for Summary Judgment filed by Young Invincibles. (cmcc,) (Entered: 10/01/2010)
10/01/2010	105	ORDER granting Motion for Leave to File Amicus Curiae Memorandum supporting Plaintiff's Motion for Summary Judgment and opposing Defendant's Motion for Summary Judgment by Randy E. Barnett, Cato Institute, Competitive Enterprise Institute (Dk. No. 102); it is ORDERED that the motion for leave to file a brief as amici curiae is granted. Signed by District Judge Henry E. Hudson on 10/1/2010.

		Copies to counsel. (cmcc,) (Entered: 10/01/2010)
10/01/2010	106	Memorandum as Amici Curiae Supporting Plaintiff's Motion for Summary Judgment and Opposing Defendant's Motion for summary Judgment filed by Randy E. Barnett, Cato Institute, Competitive Enterprise Institute. (cmcc,) (Entered: 10/01/2010)
10/04/2010	107	NOTICE of Appearance by Robert Luther, III on behalf of Americans for Free Choice in Medicine and Pacific Legal Foundation (Luther, Robert) (Entered: 10/04/2010)
10/04/2010	108	MOTION for Leave to File *Amicus Brief in Support of Plaintiff's Motion for Summary Judgment* by Washington Legal Foundation. (Attachments: # 1 Proposed Order Granting Motion for Leave, # 2 Exhibit Proposed Amicus Brief)(Samp, Richard) (Entered: 10/04/2010)
10/04/2010	109	NOTICE of Appearance by Tara Lynn Renee Zurawski on behalf of William P. Barr, Edwin Meese, III, Richard L. Thornburgh (Zurawski, Tara) (Entered: 10/04/2010)
10/04/2010	110	NOTICE of Appearance by Edwin Louis Fountain on behalf of William P. Barr, Edwin Meese, III, Richard L. Thornburgh (Fountain, Edwin) (Entered: 10/04/2010)

10/04/2010	111	MOTION for Leave to *File Amicus Curiae Brief* by Physician Hospitals of America. (Attachments: # 1 Memorandum Of Law in Support, # 2 Exhibit Proposed Amicus Brief) (Oostdyk, Scott) (Entered: 10/04/2010)
10/04/2010	112	MOTION for Extension *of Time to File a Motion for Leave to Participate as Amici Curiae* by William P. Barr, Edwin Meese, III, Richard L. Thornburgh. (Fountain, Edwin) (Entered: 10/04/2010)
10/04/2010	113	Memorandum in Support re 112 MOTION for Extension *of Time to File a Motion for Leave to Participate as Amici Curiae* filed by William P. Barr, Edwin Meese, III, Richard L. Thornburgh. (Attachments: # 1 Proposed Order)(Fountain, Edwin) (Entered: 10/04/2010)
10/04/2010	114	MOTION for Leave to File *Amicus Curiae Brief in Support of Plaintiff's Motion for Summary Judgment and in Opposition to Defendant's Motion for Summary Judgment* by American Civil Rights Union. (Attachments: # 1 Proposed Order, # 2 Exhibit Proposed amicus brief)(Gray, Daniel) (Entered: 10/04/2010)
10/04/2010	115	Financial Interest Disclosure Statement (Local Rule 7.1) by American Civil Rights Union. (Gray, Daniel) (Entered: 10/04/2010)

10/04/2010	116	NOTICE of Appearance by Richard B. Rogers on behalf of American Civil Rights Union (Rogers, Richard) (Entered: 10/04/2010)
10/04/2010	117	REPLY to Response to Motion re 88 MOTION for Summary Judgment filed by Commonwealth of Virginia, Ex Rel. Kenneth T. Cuccinelli, II. (Getchell, Earle) (Entered: 10/04/2010)
10/04/2010	118	Brief in Support *Amicus Curiae Brief of Constitutional Law Professors In Support of the Secretary's Motion For Summary Judgment* filed by Jack M. Balkin, Gillian E. Metzger, Trevor W. Morrison. (Nicely, Andrew) (Entered: 10/04/2010)
10/04/2010	119	ORDER GRANTING Plaintiff's 111 Motion for Leave to Participate as Amicus Curiae in Support of Plaintiff's Motion for Summary Judgment; Movant Physician Hospitals of America is directed to file its Brief of Amicus Curiae in Support of Plaintiff's Motion for Summary Judgment. Signed by District Judge Henry E. Hudson on 10/1/2010. (lhin,) (cmcc,). (Entered: 10/04/2010)
10/04/2010	120	ORDER GRANTING the American Civil Rights Union's 114 Motion for Leave to File Amicus Curiae Brief; upon receipt of this Order, counsel for the American Civil Rights Union shall electronically file the brief

		Signed by District Judge Henry E. Hudson on 10/4/2010. (lhin,) (Entered: 10/04/2010)
10/04/2010	121	ORDER GRANTING 112 Motion by the Former U.S. Attorneys General William Barr, Edwin Meese, III and Dick Thornburg [sic] for an Extension of Time to Seek Leave to File a Brief as amici curiae. It is FURTHER ORDERED that Movants shall file their motion seeking leave to participate as amici curiae by 10/08/2010. Signed by District Judge Henry E. Hudson on 10/04/2010. (walk,) (Entered: 10/04/2010)
10/04/2010	122	Memorandum *in Support of Plaintiff's 88 Motion for Summary Judgment and in Opposition to Defendant's 90 Motion for Summary Judgment* filed by Physician Hospitals of America. (Oostdyk, Scott). Modified docket entry on 10/05/2010. (walk,). (Entered: 10/04/2010)
10/04/2010	123	ORDER GRANTING 108 Motion by amici curiae Washington Legal Foundation and several constitutional law scholars for Leave to File an amici curiae Brief in support of Plaintiff's Motion for Summary Judgment. The Clerk shall cause the proposed brief to be filed and entered on the docket. Signed by District Judge Henry E. Hudson on 10/04/2010. (walk,) (Entered: 10/04/2010)

10/04/2010	124	NOTICE of Appearance by William Perry Pendley on behalf of Mountain States Legal Foundation (Pendley, William) (Entered: 10/04/2010)
10/04/2010	125	Brief by Washington Legal Foundation and Constitutional Law Scholars as Amici Curiae in Support of Plaintiff's 88 MOTION for Summary Judgment; filed pursuant to the Court's Order dated 10/04/2010. (walk,) (Entered: 10/04/2010)
10/04/2010	126	MOTION for Leave to File *Amicus Brief and Brief in Support* by Mountain States Legal Foundation. (Attachments: # 1 Proposed Order, # 2 Amicus Brief)(Pendley, William) (Entered: 10/04/2010)
10/04/2010	127	MOTION for Leave to File *Brief Amicus Curiae* by Pacific Legal Foundation. (Luther, Robert) (Entered: 10/04/2010)
10/04/2010	128	NOTICE of Appearance by William Perry Pendley on behalf of Mountain States Legal Foundation (Pendley, William) (Entered: 10/04/2010)
10/04/2010	129	Brief in Support *of Commonwealth of Virginia* filed by Americans for Free Choice in Medicine and Pacific Legal Foundation. (Luther, Robert). PLEASE NOTE: Received verbal notification from counsel Robert Luther, III that "Pro Hac Vice Pending" listed under his name on page one of the document is a typographical error.

		Mr. Luther is counsel of record and doesn't have a Pro Hac Vice application pending before the Court. (walk,). (Entered: 10/04/2010)
10/04/2010	130	MOTION for Leave to File *Brief Amicus Curie* [sic] *in Support of Plaintiff's Motion for Summary Judgment* by Landmark Legal Foundation. (Attachments: # 1 Proposed Order, # 2 Exhibit Brief Amicus Curiae)(St. George, Timothy) (Entered: 10/04/2010)
10/04/2010	131	Brief in Support to 88 MOTION for Summary Judgment *by Plaintiff and in Opposition to 90 MOTION for Summary Judgment by Defendant* filed by American Civil Rights Union. (Rogers, Richard) (Entered: 10/04/2010)
10/04/2010	132	REPLY to Response to Motion re 90 MOTION for Summary Judgment filed by Kathleen Sebelius. (Hambrick, Jonathan) (Entered: 10/04/2010)
10/04/2010	133	MOTION for Leave to File *Amicus Curiae Brief* by Virginia Organizing. (Attachments: # 1 Exhibit Amicus Brief, # 2 Affidavit Amicus Brief Exhibit 1)(Bennett, Leonard) (Entered: 10/04/2010)
10/04/2010	134	Memorandum in Support re 133 MOTION for Leave to File *Amicus Curiae Brief* filed by Virginia Organizing. (Bennett, Leonard) (Entered: 10/04/2010)

10/04/2010	135	Financial Interest Disclosure Statement (Local Rule 7.1) by Virginia Organizing. (Bennett, Leonard) (Entered: 10/04/2010)
10/05/2010	136	ORDER GRANTING 126 Motion by Mountain States Legal Foundation for Leave to File Amicus Curiae Brief in Support of Plaintiff's Motion for Summary Judgment. The Clerk shall cause the proposed brief to be filed and entered on the docket. It is so ORDERED. Signed by District Judge Henry E. Hudson on 10/04/2010. (walk,) (Entered: 10/05/2010)
10/05/2010	137	Amicus Curiae Brief by Mountain States Legal Foundation in Support of Plaintiff's 88 MOTION for Summary Judgment; filed pursuant to the Court's Order dated 10/05/2010. (walk,) (Entered: 10/05/2010)
10/05/2010	138	ORDER GRANTING 127 Motion for Leave to File Amicus Curiae for Americans for Free Choice in Medicine and Pacific Legal Foundation and they are directed to file their Brief of Amicus Curiae in Support of Plaintiff's 88 Motion for Summary Judgment. It is so ORDERED. Signed by District Judge Henry E. Hudson on 10/04/2010. (walk,) (Entered: 10/05/2010)
10/05/2010		Notice of Correction re: Document 122; the filing user should have

		selected the filing event "Memorandum in Support," instead of "Memorandum." The docket text has been corrected and the document has been linked to 88 and 90 motions. (walk,) (Entered: 10/05/2010)
10/05/2010	139	ORDER GRANTING 133 Motion for Leave to File Brief of Amicus Curiae Virginia Organizing in Support of Defendant's Motion for Summary Judgement and Movant Virginia Organizing is directed to file its Brief of Amicus Curiae in Support of Defendant's Motion for Summary Judgment. It is so ORDERED. Signed by District Judge Henry E. Hudson on 10/05/2010. (walk,) (Entered: 10/05/2010)
10/05/2010	140	ORDER GRANTING 130 Motion of amicus Landmark Legal Foundation for leave to file a brief as amicus curiae supporting Plaintiff's motion for summary judgment. It is FURTHER ORDERED that the Clerk shall cause the Proposed Brief to be filed and entered on the docket. Signed by District Judge Henry E. Hudson on 10/05/2010. (walk,) (Entered: 10/05/2010)
10/05/2010	141	Amicus Curiae Brief of Landmark Legal Foundation in Support of Plaintiff's 88 MOTION for Summary Judgment; filed pursuant

		to the Court's Order dated 10/05/2010. (walk,) (Entered: 10/05/2010)
10/05/2010		Notice of Correction re: Document 124; the filing user has been requested to file a separate Certificate of Service and link it to document 124. (walk,). The filing user has also been requested to file a separate Certificate of Service for Document 128 which appears to be a duplicate of Document 124 . (walk,) (Entered: 10/05/2010)
10/05/2010		Notice of Correction re: Document 130; the filing user's login does not match the signature on the document. The filing user must refile the document with the filing user's signature block, or the attorney whose signature block appears on the document must refile the document. (walk,) (Entered: 10/05/2010)
10/05/2010	142	CERTIFICATE of Service re 124 Notice of Appearance by William Perry Pendley on behalf of Mountain States Legal Foundation (Pendley, William) (Entered: 10/05/2010)
10/05/2010	143	CERTIFICATE of Service re 128 Notice of Appearance by William Perry Pendley on behalf of Mountain States Legal Foundation (Pendley, William) (Entered: 10/05/2010)
10/05/2010	144	MOTION by Eve Ellingwood to Intervene. (Attachments: # 1 Exhibit A, # 2 Exhibit B1, # 3 Exhibit B2, # 4

Exhibit C, # 5 Exhibit D, and # 6 Exhibit E). (walk,) (Entered: 10/05/2010)

10/05/2010 145 Amended MOTION for Leave to File *Breif* [sic] *Amicus Curiae in Support of Plaintiff's Motion for Summary Judgment* by Landmark Legal Foundation. (Attachments: # 1 Proposed Order, # 2 Amicus Brief)(St. George, Timothy) (Entered: 10/05/2010)

10/06/2010 146 ORDER DENYING 144 Motion by Eve Ellington for Intervention. It is so ORDERED. Signed by District Judge Henry E. Hudson on 10/06/2010. Copy mailed to Movant. (walk,) (Entered: 10/06/2010)

10/08/2010 147 NOTICE by Kathleen Sebelius re 90 MOTION for Summary Judgment *of Supplemental Authority* (Attachments: # 1 Supplement Supplemental Authority)(Hambrick, Jonathan) (Entered: 10/08/2010)

10/08/2010 148 MOTION for Leave to File *Brief as Amici Curiae* by William P. Barr, Edwin Meese, III, Richard L. Thornburgh. (Zurawski, Tara) (Entered: 10/08/2010)

10/08/2010 149 Memorandum in Support re 148 MOTION for Leave to File Brief as Amici Curiae filed by William P. Barr, Edwin Meese, III, Richard L. Thornburgh. (Attachments: # 1 Proposed Amici Curiae Brief, # 2

		Proposed Order) (Zurawski, Tara) (Entered: 10/08/2010)
10/08/2010	150	ORDER granting 148 Motion for Leave to File Brief as Amici Curiae; the Clerk shall cause the proposed brief to be filed. Signed by District Judge Henry E. Hudson on 10/8/10. (jtho,) (Entered: 10/08/2010)
10/12/2010	151	Memorandum of Amici Curiae, Former United States Attorneys General William Barr, Edwin Meese, Dick Thornburgh, in Support *OF PLAINTIFF'S MOTION FOR SUMMARY JUDGMENT (Amici Curiae)* . (Zurawski, Tara) Modified on 10/12/2010 to edit(cmcc,). (Entered: 10/12/2010)
10/13/2010	152	ORDER that, in her Memorandum in Opposition to Plaintiff's Motion for Summary Judgment, the Secretary, at this late stage, asserts that the Commonwealth's failure to join the Secretary of the Treasury as an indispensible party entitles her to judgment; the Court is not persuaded that the Secretary of the Treasury is a necessary party. Defendant's request for judgment for failure to join the Secretary of the Treasury is DENIED (see Order for details). Signed by District Judge Henry E. Hudson on 10/13/2010. Copies to counsel of record.(cmcc,) (Entered: 10/13/2010)

10/15/2010	153	NOTICE by Commonwealth of Virginia, Ex Rel. Kenneth T. Cuccinelli, II re 88 MOTION for Summary Judgment *Plaintiff's Notice of Supplemental Authority* (Attachments: # 1 Exhibit)(Getchell, Earle) (Entered: 10/15/2010)
10/15/2010	154	ORDER granting 99 Motion for Pro hac vice. Timothy Sandefur appointed for Amici Americans for Free Choice in Medicine and Pacific Legal Foundation. Signed by District Judge Henry E. Hudson on 10/15/2010. Copies to counsel. (cmcc,) (Entered: 10/15/2010)
10/15/2010	155	ORDER granting 100 Motion for Pro hac vice. Luke Anthony Wake appointed for Americans for Free Choice in Medicine and Pacific Legal Foundation. Signed by District Judge Henry E. Hudson on 10/15/2010. Copies to counsel. (cmcc,) (Entered: 10/15/2010)
10/18/2010	156	Minute Entry for proceedings held before District Judge Henry E. Hudson (Court Reporter Liscio, OCR): Motion Hearing held on 10/18/2010 re 88 Motion for Summary Judgment filed by Commonwealth of Virginia and 90 Motion for Summary Judgment filed by Kathleen Sebelius. Argument heard. Matter taken under advisement by Court; Memorandum Opinion to enter. (rpiz) (Entered: 10/18/2010)

11/07/2010	157	TRANSCRIPT of proceedings held on October 18, 2010 before Judge Henry E. Hudson. Court Reporter/ Transcriber Krista Liscio, telephone number 804 916-2296. Transcript may be viewed at the court public terminal or purchased through the Court Reporter/Transcriber before the deadline for Release of Transcript Restriction. After that date it may be obtained through PACER Redaction Request due 12/7/2010. Redacted Transcript Deadline set for 1/7/2011. Release of Transcript Restriction set for 2/5/2011.(liscio, krista) (Entered: 11/07/2010)
11/08/2010	158	Notice of Filing of Official Transcript re 157 Transcript. (cmcc,) (Entered: 11/08/2010)
11/24/2010	159	ORDER DENYING Motion by amicus curiae W. Spencer Connerat, III for leave to file the Motion for Summary Judgment and Warrant for Arrest, as well as any further filings in this action (please see Order for additional information). The Clerk is directed to lodge the aforementioned document in the Clerk's Office in the event that a notice of appeal if filed regarding this Order. It is so ORDERED. Signed by District Judge Henry E. Hudson on 11/24/2010. Copy mailed to Mr. Connerat. (walk,) (Entered: 11/24/2010)

12/03/2010	160	NOTICE by Kathleen Sebelius re 90 MOTION for Summary Judgment *of Supplemental Authority* (Attachments: # 1 Supplemental Authority) (Hambrick, Jonathan) (Entered: 12/03/2010)
12/13/2010	161	MEMORANDUM OPINION. Signed by District Judge Henry E. Hudson on 12/13/2010. (walk,) (Entered: 12/13/2010)
12/13/2010	162	ORDER that Plaintiff's 88 Motion for Summary Judgment is GRANTED as to its request for declaratory relief and DENIED as to its request for injunctive relief, and Defendant's 90 Motion for Summary Judgment is DENIED. It is so ORDERED. Signed by District Judge Henry E. Hudson on 12/13/2010. (walk,) (Entered: 12/13/2010)
01/18/2011	163	NOTICE OF APPEAL by Kathleen Sebelius. (Hambrick, Jonathan) (Entered: 01/18/2011)
01/18/2011	164	NOTICE OF APPEAL by Commonwealth of Virginia, Ex Rel. Kenneth T. Cuccinelli, II. (Getchell, Earle) (Entered: 01/18/2011)
01/18/2011	165	USCA Appeal Fees received $ 455, receipt number 34683011385, re 164 Notice of Appeal filed by Commonwealth of Virginia, Ex Rel. Kenneth T. Cuccinelli, II (lbre,) (Entered: 01/18/2011)

01/19/2011	166	Transmission of Notice of Appeal to US Court of Appeals re 163 Notice of Appeal. (All case opening forms, plus the transcript guidelines, may be obtained from the Fourth Circuit's website at www.ca4.uscourts.gov) (lbre,) (Entered: 01/19/2011)
01/19/2011	167	Transmission of Notice of Appeal to US Court of Appeals re 164 Notice of Appeal. (All case opening forms, plus the transcript guidelines, may be obtained from the Fourth Circuit's website at www.ca4.uscourts.gov) (lbre,) (Entered: 01/19/2011)
01/20/2011		USCA Case Number 11-1057, Case Manager R.Warren, for 163 Notice of Appeal filed by Kathleen Sebelius. (lbre,) (Entered: 01/20/2011)
01/20/2011		USCA Case Number 11-1058, Case Manager R.Warren, for 164 Notice of Appeal filed by Commonwealth of Virginia, Ex Rel. Kenneth T. Cuccinelli, II. (lbre,) (Entered: 01/20/2011)
01/20/2011	168	ORDER of USCA as to 164 Notice of Appeal filed by Commonwealth of Virginia, Ex Rel. Kenneth T. Cuccinelli, II, 163 Notice of Appeal filed by Kathleen Sebelius : The Court consolidates Case No. 11-1057(L) and Case No. 11-1058. (lbre,) (Entered: 01/20/2011)

183

(3)

No. 10-1014

Supreme Court, U.S.
FILED
MAR 14 2011
OFFICE OF THE CLERK

In the Supreme Court of the United States

VIRGINIA, EX REL. KENNETH T. CUCCINELLI, II,
ATTORNEY GENERAL OF VIRGINIA, PETITIONER

v.

KATHLEEN SEBELIUS, SECRETARY OF HEALTH AND
HUMAN SERVICES

ON PETITION FOR A WRIT OF CERTIORARI
BEFORE JUDGMENT
TO THE UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

BRIEF FOR THE RESPONDENT IN OPPOSITION

NEAL KUMAR KATYAL
Acting Solicitor General
Counsel of Record
TONY WEST
Assistant Attorney General
BETH S. BRINKMANN
Deputy Assistant Attorney General
MARK B. STERN
ALISA B. KLEIN
Attorneys
Department of Justice
Washington, D.C. 20530-0001
SupremeCtBriefs@usdoj.gov
(202) 514-2217

QUESTION PRESENTED

Beginning in 2014, the minimum coverage provision of the Patient Protection and Affordable Care Act (Affordable Care Act), will require non-exempted individuals to maintain a minimum level of health insurance or pay a tax penalty. Pub. L. No. 111-148, § 1501(b), 124 Stat. 244-249 (to be codified at 26 U.S.C. 5000A). Constitutional challenges to the provision are now pending in four courts of appeals, three of which have expedited proceedings—including in this very case. The question presented is whether the Court should grant certiorari before judgment in the court of appeals to decide:

1. Whether the district court erred in holding that petitioner could establish standing to challenge the minimum coverage provision by enacting a law that declares that no Virginia resident "shall be required to obtain or maintain" an individual insurance policy. Va. Code Ann. § 38.2-3430.1:1 (Supp. 2010).

2. Whether the district court erred in holding that the minimum coverage provision is not a valid exercise of Congress's Article I powers.

3. Whether the district court erred in holding that the minimum coverage provision is severable from other provisions of the Affordable Care Act.

4. Whether the district court erred in denying an injunction.

TABLE OF CONTENTS

Page

Opinions below 1
Jurisdiction 1
Statement 2
Argument 11
Conclusion 23

TABLE OF AUTHORITIES

Cases:

Alfred L. Snapp & Son, Inc. v. *Puerto Rico*, 458 U.S. 592 (1982) 19
Carter v. *Carter Coal Co.*, 298 U.S. 238 (1936) 18
Florida ex rel. Bondi v. *United States Dep't of Health & Human Servs.*, No. 3:10-CV-91-RV/EMT:
2011 WL 285683 (N.D. Fla. Jan. 31, 2010) .....
2011 WL 723117 (N.D. Fla. Mar. 33, 2011) .....
Free Enter. Fund v. *Public Co. Accounting Oversight Bd.*, 130 S. Ct. 3138 (2010) 15
Georgia v. *Pennsylvania R.R.*, 324 U.S. 439 (1945) 22
Gratz v. *Bollinger*, 539 U.S. 244 (2003) 19
Liberty Univ. v. *Geithner*, No. 6:10-cv-00015-nkm, 2010 WL 4860299 (W.D. Va. Nov. 30, 2010) 11
Massachusetts v. *EPA*, 549 U.S. 497 (2007) 19, 21, 22
Massachusetts v. *Mellon*, 262 U.S. 447 (1923) 9, 20, 21
Mead v. *Holder*, No. Civ. A. 10-950 GK, 2011 WL 611139 (D.D.C. Feb. 22, 2011) 13
Missouri v. *Illinois*, 180 U.S. 208 (1901) 20
Mistretta v. *United States*, 488 U.S. 361 (1989) 17
New Haven Inclusion Cases, 399 U.S. 392 (1970) 19

Cases—Continued: Page

New Jersey v. *Sargent*, 269 U.S. 328 (1926) 21
New York v. *United States*, 505 U.S. 144 (1992) 21
Oregon v. *Mitchell*, 400 U.S. 112 (1970) 21
Porter v. *Dicken*, 328 U.S. 252 (1946) 19
Railroad Ret. Bd. v. *Alton R.R.*, 295 U.S. 330 (1935) 18
Roberts v. *Galen of Va., Inc.*, 525 U.S. 249 (1999) 7
St. Louis, Kan. City & Col. R.R. v. *Wabash R.R.*, 217 U.S. 247 (1910) 18
Thomas More Law Ctr. v. *Obama*, 720 F. Supp.2d 882 (E.D. Mich. 2010) 12, 13
United States v. *Bankers Trust Co.*, 294 U.S. 240 (1935) 19
United States v. *Mendoza*, 464 U.S. 154 (1984) 13
United States v. *United Mine Workers*, 330 U.S. 258 (1947) 17, 18
Youngstown Sheet & Tube Co. v. *Sawyer*, 343 U.S. 579 (1952) 18

Constitution, statutes and rule:

U.S. Const., Art. I 2, 8
§ 8, Cl. 3 (Commerce Clause) 10
Bituminous Coal Conservation Act of 1935, 15 U.S.C. 801 *et seq.* 18
Emergency Medical Treatment and Labor Act, 42 U.S.C. 1395dd 7
Health Care and Education Reconciliation Act of 2010, Pub. L. No. 111-152 3
§ 1001(a), 124 Stat. 1030 (to be codified at 26 U.S.C. 36B) 4

Statutes and rule—Continued: Page

§ 1002(a)(1), 124 Stat. 1032 (to be codified at 26 U.S.C. 5000A(g)) 5
§ 1002(b)(2), 124 Stat. 1032 (to be codified at 26 U.S.C. 5000A(e)(2)) 5
§ 1003, 124 Stat. 1033 (to be codified at 26 U.S.C. 4980H) 3
§ 1004(a)(1)(A), 124 Stat. 1034 (to be codified at 26 U.S.C. 36B(d)(2)(A)) 4
§ 1004(a)(2)(A), 124 Stat. 1034 (to be codified at 26 U.S.C. 36B(d)(2)(B)) 4
§ 1201(1)(B), 124 Stat. 1051 (to be codified at 26 U.S.C. 1396d(y)(1)) 4
Patient Protection and Affordable Care Act, Pub. L. No. 111-148, 124 Stat. 119 ..... *passim*
§ 1001(5), 124 Stat. 130:
124 Stat. 131 (to be codified at 42 U.S.C. 300gg-11) 5
124 Stat. 131 (to be codified at 42 U.S.C. 300gg-12) 5
§ 1201(3), 124 Stat. 154 (to be codified at 42 U.S.C. 300gg) 5
§ 1201(4), 124 Stat. 155 (to be codified at 42 U.S.C. 300gg-1(a), 300gg-3(a)) 4
§ 1311, 124 Stat. 173 (to be codified at 42 U.S.C. 18031) 4
§ 1401(a), 124 Stat. 213 (to be codified at 26 U.S.C. 36B) 4
§ 1421(a), 124 Stat. 237 (to be codified at 26 U.S.C. 45R) 3

Statutes and rule—Continued: Page

§ 1501(a), 124 Stat. 242 (to be codified at 42 U.S.C. 18091(a)) 3
§ 1501(a)(2), 124 Stat. 243 (to be codified at 42 U.S.C. 18091(a)(2)) 3
§ 1501(a)(2)(A), 124 Stat. 243 (to be codified at 42 U.S.C. 18091(a)(2)(A)) 8
§ 1501(a)(2)(G), 124 Stat. 243 (to be codified at 42 U.S.C. 18091(a)(2)(I)) 9, 10
§ 1501(b), 124 Stat. 244 (to be codified at 26 U.S.C. 5000A 5
124 Stat. 244 (to be codified at 26 U.S.C. 5000A(b)(2)) 5
124 Stat. 245 (to be codified at 26 U.S.C. 5000A(c)(1)) 5
124 Stat. 245 (to be codified at 26 U.S.C. 5000A(c)(2)) 5
124 Stat. 247 (to be codified at 26 U.S.C. 5000A(e)(2)) 5
124 Stat. 248 (to be codified at 26 U.S.C. 5000A(f)) 5
124 Stat. 249 (to be codified at 26 U.S.C. 5000A(g)) 5
§ 1513(a), 124 Stat. 253-255 (to be codified at 26 U.S.C. 4980H) 3
§ 2001(a)(1)(C), 124 Stat. 271 (to be codified at 42 U.S.C. 1396(a)(10)(A)(i)(VIII)) 4
§ 2001(a)(3)(B), 124 Stat. 272 (to be codified at 42 U.S.C. 1396d(y)(1)(VIII)) 4

Statutes and rule—Continued: Page

§ 10101(a), 124 Stat. 883 (to be codified at 42 U.S.C. 300gg-11)) 4
§ 10104(e)-(h), 124 Stat. 900-901 (to be codified at 42 U.S.C. 18031) 4
§ 10105(a)-(c), 124 Stat. 906 (to be codified at 26 U.S.C. 36B) 3
§ 10105(e), 124 Stat. 906 (to be codified at 26 U.S.C. 45R) 3
§ 10106(a), 124 Stat. 907 (to be codified at 42 U.S.C. 18091(a)(2)) 3
124 Stat. 907 (to be codified at 42 U.S.C. 18091(a)(2)(A)) 8
124 Stat. 908 (to be codified at 42 U.S.C. 18091(a)(2)(F)) 8, 10
124 Stat. 908 (to be codified at 42 U.S.C. 18091(a)(2)(I)) 9, 10
§ 10106(b)(2), 124 Stat. 909 (to be codified at 26 U.S.C. 5000A(c)(1) and (2)) 5
§ 10106(e), 124 Stat. 910 (to be codified at 26 U.S.C. 4980H) 3
§ 10106(f), 124 Stat. 910 (to be codified at 26 U.S.C. 4980H) 3
§ 10108(h)(1), 124 Stat. 914 (to be codified at 26 U.S.C. 36B) 4
§ 10108(i)(1)(A), 124 Stat. 914 (to be codified at 26 U.S.C. 4980H) 3
§ 10203(a), 124 Stat. 927 (to be codified at 26 U.S.C. 18031) 4
Va. Code Ann. § 38.2-3430.1:1 (Supp. 2010) 9, 20

Rule—Continued: Page

Sup. Ct. R. 11 12

Miscellaneous:

Centers for Medicare & Medicaid Services, *2009 National Health Expenditures Data*, (2011), http://www.cms.gov/NationalHealthExpendData/downloads/tables.pdf 7

Department of Planning & Budget, *2011 Fiscal Impact Statement, HB 2434*, Va. Gen. Assembl. Legis. Info. Sys. 1 (Jan. 20, 2011), http://leg1.state.va.us/cgi-bin/legp504.exe?111+oth+HB2434F122+PDF 16

Expanding Consumer Choice and Addressing "Adverse Selection" Concerns in Health Insurance: Hearings Before the Joint Econ. Comm., 108th Cong., 2d Sess. (2004) 6

47 Million and Counting: Why the Health Care Marketplace is Broken: Hearing Before the Senate Comm. on Finance, 110th Cong. 2d Sess. (2008) 9

H.B. 1928, Gen. Assemb., Reg. Sess. (Va. 2011) 16

H.B. 1958, Gen. Assemb., Reg. Sess. (Va. 2011) 16

H.B. 2434, Gen. Assemb., Reg. Sess. (Va. 2011) 16

H.R. Rep. No. 241, 99th Cong., 1st Sess. Pt. 3 (1985) 7

International Fed'n of Health Plans, *2010 Comparative Price Reporti: Medical and Hospital Fees by Counting*, http://www.ifhp.com/documents/IFHPpricereport151210.pdf 6

Miscellaneous—Continued: Page

James Lindgren & William P. Marshall, *The Supreme Court's Extraordinary Power to Grant Certiorari Before Judgment in the Court of Appeals*, 1986 Sup. Ct. Rev. 259 18

Neal J. Meropol et al., *Cost of Cancer Care: Issues and Implications*, 25 J. Clin. Oncol. 180 (2007) 6

National Health Expenditures Data, Centers for Medicare & Medicaid Servs. (2011), http://www.cms.gov/NationalHealthExpendData/downloads/tables.pdf 7

News Release, HHS.gov:

Forty-eight states receive new resources to help states implement Affordable Care Act (Sept. 30, 2010), http://www.hhs.gov/news/press/2010pres/09/20100930b.html 16

HHS Announces new resources to help states implement Affordable Care Act (Jan. 20, 2011), http://www.hhs.gov/news/press/2011pres/01/20110120b.html 16

State Corp. Comm'n, *2011 Fiscal Impact Statement*:

HB 1928, http://leg1.state.va.us/cgi-bin/legp504.exe?111+oth+HB1928FER171+PDF 16

HB 1958, http://leg1.state.va.us/cgi-bin/legp504.exe?111+oth+HB1958FER171+PDF 16

U.S. Dep't of Health & Human Servs.:

At Risk: Pre-Existing Conditions Could Affect 1 in 2 Americans, HealthCare.gov (2011), http://www. healthcare.gov/center/reports/preexisting.html 3

Miscellaneous—Continued: Page

Exchange Planning Grants: Grant Awards List, HealthCare.gov (July 29, 2010), http://www.healthcare.gov/news/factsheets/grantawardslist.html 16

In the Supreme Court of the United States

No. 10-1014

VIRGINIA, EX REL. KENNETH T. CUCCINELLI, II, ATTORNEY GENERAL OF VIRGINIA, PETITIONER

v.

KATHLEEN SEBELIUS, SECRETARY OF HEALTH AND HUMAN SERVICES

ON PETITION FOR A WRIT OF CERTIORARI BEFORE JUDGMENT TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

BRIEF FOR THE RESPONDENT IN OPPOSITION

OPINIONS BELOW

The opinion of the district court denying respondent's motion to dismiss (Pet. App. 54-89) is reported at 702 F. Supp. 2d 598. The opinion of the district court granting summary judgment for petitioner in part (Pet. App. 1-53) is reported at 728 F. Supp. 2d 768.

JURISDICTION

The judgment of the district court was entered on December 13, 2010. Respondent filed a notice of appeal on January 18, 2011. Petitioner also filed a notice of appeal on January 18, 2011. The petition for a writ of certiorari before judgment was filed on February 8, 2011.

This Court's jurisdiction is invoked under 28 U.S.C. 1254(1) and 2101(e).

STATEMENT

The Virginia General Assembly enacted a statute declaring that its residents do not have to comply with a provision of the Patient Protection and Affordable Care Act (Affordable Care Act or Act), Pub. L. No. 111-148, 124 Stat. 119, requiring non-exempted individuals to maintain a minimum level of health insurance or pay a tax penalty. Petitioner then used its state statute to sue respondent in an effort to secure a declaration that its state statute is valid because the federal minimum coverage provision falls outside Congress's enumerated powers under Article I of the Constitution. The district court found that petitioner had standing and granted petitioner summary judgment on its constitutional claim. Both parties appealed, and, on a joint motion by respondent and petitioner, the court of appeals expedited briefing in the case and will hear oral argument on May 10. Petitioner nonetheless seeks to bypass that process of orderly appellate review by asking this Court to grant certiorari before judgment. The petition for a writ of certiorari before judgment should be denied.

1. Congress enacted the Affordable Care Act to ameliorate the longstanding crisis in the interstate market for health care services, which accounts for more than 17% of the Nation's gross domestic product. Among other problems, millions of people without health insurance consume health care services for which they do not fully pay. These uncompensated costs—totaling $43 billion in 2008—are shifted to health care providers in the interstate health care market. Providers pass on much of this cost to private health insurance companies,

which also operate interstate. The result is higher premiums, which, in turn, make insurance unaffordable to even more people. See generally Act §§ 1501(a) and (a)(2), 10106(a), 124 Stat. 242, 243, 907 (to be codified at 42 U.S.C. 18091(a) and (a)(2)) (congressional findings). At the same time, insurance companies use restrictive underwriting practices to deny coverage or charge unaffordable premiums to millions of people because they have pre-existing medical conditions.[1]

a. The Affordable Care Act includes several measures designed to make affordable, comprehensive health insurance coverage widely available, protect consumers from restrictive insurance underwriting practices, and reduce the uncompensated costs of medical care obtained by the uninsured, which are borne by others in the health care market.

First, the Act builds upon the existing nationwide system of employer-based health insurance that is the principal private mechanism for health care financing. The Act establishes tax incentives for small businesses to purchase health insurance for their employees, §§ 1421(a), 10105(e), 124 Stat. 237, 906 (to be codified at 26 U.S.C. 45R), and, under certain circumstances, prescribes tax penalties starting in 2014 for large employers that do not offer full-time employees adequate coverage. §§ 1513(a), 10106(e) and (f), 10108(i)(1)(A), 124 Stat. 253, 910, 914; Health Care and Education Reconciliation Act of 2010 (Reconciliation Act), Pub. L. No. 111-152, § 1003, 124 Stat. 1033 (to be codified at 26 U.S.C. 4980H).

---

[1] See U.S. Dep't of Health & Human Servs., *At Risk: Pre-Existing Conditions Could Affect 1 in 2 Americans*, HealthCare.gov (2011), http://www.healthcare.gov/center/reports/preexisting.html.

Second, the Act provides for the creation of health insurance exchanges to allow individuals, families, and small businesses to use the leverage of collective buying power to obtain prices that are competitive with those of large-employer group plans. §§ 1311, 10104(e)-(h), 10203(a), 124 Stat. 173, 900-901, 927 (to be codified at 42 U.S.C. 18031).

Third, for individuals and families with household income between 133% and 400% of the federal poverty level who purchase health insurance coverage through an exchange, the Act establishes federal tax credits that can offset all or part of payments for the insurance premiums. §§ 1401(a), 10105(a)-(c), 10108(h)(1), 124 Stat. 213, 906, 914; Reconciliation Act §§ 1001(a), 1004(a)(1)(A) and (a)(2)(A), 124 Stat. 1030, 1034 (to be codified at 26 U.S.C. 36B). In addition, Congress expanded eligibility for Medicaid to cover individuals with income below 133% of the federal poverty level. § 2001(a)(1)(C), 124 Stat. 271 (to be codified at 42 U.S.C. 1396a(a)(10)(A)(i)(VIII)). The Act provides that the federal government will pay for 100% of the expenditures required to cover recipients made newly eligible under the Act through 2016, gradually declining to 90% in 2020 and beyond—far above the usual federal matching rates under Medicaid. § 2001(a)(3)(B), 124 Stat. 272; Reconciliation Act, § 1201(1)(B), 124 Stat. 1051 (to be codified at 42 U.S.C. 1396d(y)(1)).

Fourth, the Act imposes new regulations on insurance companies to protect individuals from industry practices that have prevented people from obtaining and keeping health insurance. The Act bars insurance companies from refusing to cover individuals because of a pre-existing medical condition, § 1201(4), 124 Stat. 155 (to be codified at 42 U.S.C. 300gg-1(a), 300gg-3(a)), can-

celing insurance absent fraud or intentional misrepresentation of material fact, § 1001(5), 124 Stat. 131 (to be codified at 42 U.S.C. 300gg-12), charging higher premiums based on a person's medical history, § 1201(3), 124 Stat. 154 (to be codified at 42 U.S.C. 300gg), and placing lifetime dollar caps on the benefits of a policyholder for which the insurer will pay, §§ 1001(5), 10101(a), 124 Stat. 130, 883 (to be codified at 42 U.S.C. 300gg-11).

Finally, the Act amends the Internal Revenue Code to provide that, starting in 2014, a non-exempted individual who fails to maintain a minimum level of health insurance must pay a tax penalty. § 1501(b), 124 Stat. 244-249 (to be codified at 26 U.S.C. 5000A).[2] Under this minimum coverage provision, individuals who are not required to file income tax returns for a given year are not required to pay the penalty. § 1501(b), 124 Stat. 247; Reconciliation Act, § 1002(b)(2), 124 Stat. 1032 (to be codified at 26 U.S.C. 5000A(e)(2)). The amount of any penalty is calculated in part by reference to household income for federal income tax purposes; it is reported on the individual's federal income tax return for the taxable year; and it is assessed and collected in the same manner as certain other federal tax penalties. §§ 1501(b), 10106(b)(2), 124 Stat. 244-245, 249, 909; Reconciliation Act, § 1002(a)(1), 124 Stat. 1032 (to be codified at 26 U.S.C. 5000A(b)(2), (c)(1), (c)(2) and (g)).

---

[2] This insurance requirement may be satisfied through enrollment in an employer-sponsored insurance plan, an individual market plan including a plan offered through a new health insurance exchange, a grandfathered health plan, certain government-sponsored programs such as Medicare, Medicaid, or TRICARE, or similar coverage recognized by the Secretary of Health and Human Services in coordination with the Secretary of the Treasury. Act § 1501(b), 124 Stat. 248 (to be codified at 26 U.S.C. 5000A(f)).

b. In enacting the Affordable Care Act in general, and the minimum coverage provision in particular, Congress recognized that it confronted a market that differs in significant respects from all others.

First, participation in the market for health care is essentially universal, and an individual's need for expensive medical care is unpredictable. Nearly everyone will require health care services at some point in his or her life, and "[m]ost medical expenses for people under 65" result "from the 'bolt-from-the-blue' event of an accident, a stroke, or a complication of pregnancy that we know will happen on average but whose victim we cannot (and they cannot) predict well in advance." *Expanding Consumer Choice and Addressing "Adverse Selection" Concerns in Health Insurance: Hearings Before the Joint Econ. Comm.*, 108th Cong., 2d Sess. 32 (2004) (statement of Mark V. Pauly, Univ. of Pennsylvania). Costs can mount rapidly for treatment of even the most common significant health problems.[3] It is difficult for all, and impossible for many, to budget for such contingencies.

Second, because of the virtually inevitable, yet unpredictable, need for health care services, individuals typically pay for them through insurance. In 2009, payments by private health insurers constituted 32% of na-

---

[3] For example, the average cost of an appendectomy in 2010 was $13,123. International Fed'n of Health Plans, *2010 Comparative Price Report: Medical and Hospital Fees By Country*, 14, http://www.ifhp.com/documents/IFHPpricereport151210.pdf. The average cost of a day in the hospital was $3,612; of a hospital stay, $14,427; of a Caesarian-section, $13,016; of bypass surgery, $59,770; of an angioplasty, $29,055. *Id.* at 9, 10, 12, 16, 17. Drug treatment for a common form of cancer costs more than $150,000 a year. Neal J. Meropol et al., *Cost of Cancer Care: Issues and Implications*, 25 J. Clin. Oncol. 180, 182 (2007).

tional health care spending. *National Health Expenditures Data*, Centers for Medicare & Medicaid Servs., table 3 (2011), http://www.cms.gov/NationalHealthExpendData/downloads/tables.pdf. More than 43% of total health care expenditures was financed by federal, state, and local governments, including through insurance programs such as Medicare, the federal program that provides health insurance for elderly and certain disabled Americans, as well as Medicaid. *Id.* tables 5, 11.

Third, many individuals receive, and expect to receive, costly health care services in times of need without regard to their ability to pay for the services. For 25 years, the federal Emergency Medical Treatment and Labor Act (EMTALA) has required hospitals that participate in Medicare and offer emergency services to stabilize any patient who arrives with an emergency condition, regardless of whether the person has insurance or otherwise can pay. 42 U.S.C. 1395dd; see *Roberts* v. *Galen of Va., Inc.*, 525 U.S. 249, 250-251 (1999) (per curiam). Even before enactment of EMTALA, many state legislatures and courts had concluded that hospitals cannot properly turn away people in need of emergency treatment. See, *e.g.*, H.R. Rep. No. 241, 99th Cong., 1st Sess. Pt. 3, at 5 (1985) (in addition to "state court rulings impos[ing] a common law duty on doctors and hospitals to provide necessary emergency care," by 1985, "at least 22 states [had] enacted statutes or issued regulations requiring the provision of limited medical services whenever an emergency situation exists"). The federal Medicare and Medicaid programs provide substantial support for hospitals that incur such uncompensated costs through additional payments for "disproportionate share hospitals," and many States have addi-

tional programs to support hospitals with significant amounts of uncompensated care.

Against the backdrop of these unique and fundamental features of the market for health care services, Congress made specific statutory findings addressing the basis for exercising its powers under Article I of the Constitution. For example, it found that the minimum coverage provision "regulates activity that is commercial and economic in nature: economic and financial decisions about how and when health care is paid for, and when health insurance is purchased." §§ 1501(a)(2)(A), 10106(a), 124 Stat. 243, 907 (to be codified at 42 U.S.C. 18091(a)(2)(A)). Congress concluded that "[i]n the absence of the requirement, some individuals would make an economic and financial decision to forego health insurance coverage and attempt to self-insure, which increases financial risks to households and medical providers." § 10106(a), 124 Stat. 907 (to be codified at 42 U.S.C. 18091(a)(2)(A)). Congress found that the provision will reduce the substantial cost-shifting in the interstate health care market that results from the practice of consuming health care without insurance and that increases the premiums of insured consumers. § 10106(a), 124 Stat. 908 (to be codified at 42 U.S.C. 18091(a)(2)(F)).

In addition, Congress found that the minimum coverage provision is key to the viability of the Act's requirement that insurers provide coverage and charge premiums without regard to a person's medical condition or history. Without a minimum coverage requirement, "many individuals would wait to purchase health insurance until they needed care," which would undermine the effectiveness of insurance markets. §§ 1501(a)(2)(G), 10106(a), 124 Stat. 243, 908 (to be codified at 42 U.S.C.

18091(a)(2)(I)); see, *e.g.*, *47 Million and Counting: Why the Health Care Marketplace is Broken, Hearings Before the Senate Comm. on Fin.*, 110th Cong., 2d Sess. 52 (2008) (statement of Mark A. Hall, Wake Forest Univ.) (a "health insurance market could never survive or even form if people could buy their insurance on the way to the hospital").

2. On March 10, 2010—13 days before enactment of the Affordable Care Act—the Virginia General Assembly passed a statute providing that "[n]o resident of this Commonwealth * * * shall be required to obtain or maintain a policy of individual insurance coverage except as required by a court or the Department of Social Services where an individual is named a party in a judicial or administrative proceeding." Va. Code Ann. § 38.2-3430.1:1 (Supp. 2010). The day the Affordable Care Act was signed into law, petitioner filed suit against respondent, asking the district court to "declare that § 38.2-3430.1:1 is a valid exercise of state power" because the minimum coverage provision was enacted in excess of Congress's enumerated powers. Compl. 6 (prayer for relief).

Respondent moved to dismiss for lack of standing because the minimum coverage provision applies only to individuals, not States like petitioner, and a State does not have *parens patriae* standing to assert the interests of its citizens in a suit against the United States. Pet. App. 58-59 (citing, *inter alia*, *Massachusetts* v. *Mellon*, 262 U.S. 447 (1923)). The district court denied the motion to dismiss. *Id.* at 54-89. The court acknowledged that Virginia's statute was merely "declaratory," but held that petitioner could nonetheless sue the United States "to defend the [statute] from the conflicting effect of an allegedly unconstitutional federal law." *Id.* at 66.

On cross-motions for summary judgment, the district court held that the minimum coverage provision is not a valid exercise of Congress's power under the Commerce Clause or its power to lay and collect taxes. Pet. App. 1-46. In addressing the commerce power, the court did not question Congress's finding that consumption of health care services without insurance imposes a substantial burden on the interstate health care market. § 10106(a), 124 Stat. 908 (to be codified at 42 U.S.C. 18091(a)(2)(F)). Nor did the court question Congress's finding that the minimum coverage provision is instrumental to the Act's provisions that bar insurance companies from denying coverage because of pre-existing medical conditions. §§ 1501(a)(2)(G), 10106(a), 124 Stat. 243, 908 (to be codified at 42 U.S.C. 18091(a)(2)(I)). The district court nonetheless concluded that Congress has authority under the Commerce Clause to regulate only "self-initiated action" and that regulation of the means of payment for health care services does not fall into that category. Pet. App. 28-29. The court reasoned that defining economic activity to include regulation of how people pay for health care, including people who decline to purchase insurance, "lacks logical limitation and is unsupported by Commerce Clause jurisprudence." *Id.* at 29.

Addressing Congress's taxing power, the court recognized that the minimum coverage provision amends the Internal Revenue Code to provide that non-exempted individuals who fail to maintain minimum coverage shall pay a penalty, which is calculated in part by reference to household income, is reported on the individual's federal income tax return for the taxable year, and is assessed and collected in the same manner as certain other federal tax penalties. Pet. App. 32-33. The court

also acknowledged that the Congressional Budget Office projected that this provision will generate billions of dollars of revenue each year that will be paid into the general treasury. *Id.* at 32. Nonetheless, the court held that the provision is not a valid exercise of Congress's taxing power because, in the court's view, the "legislative purpose underlying this provision was purely regulation of what Congress misperceived to be economic activity." *Id.* at 40.

The district court issued a declaratory judgment that the minimum coverage provision is unconstitutional. Pet. App. 52. The court determined that the minimum coverage provision and "directly-dependent provisions which make specific reference" to it are severable from the remainder of the Affordable Care Act, *id.* at 49, and denied injunctive relief, *id.* at 49-50.

3. Both parties appealed, jointly moved for expedited briefing and argument, and asked that the case be heard by the Fourth Circuit on the same day as *Liberty University* v. *Geithner*, No. 10-2347, in which a different district court upheld the constitutionality of the minimum coverage provision against challenge by several uninsured individuals and a non-profit organization. See *Liberty Univ.* v. *Geithner*, No. 6:10-cv-00015-nkm, 2010 WL 4860299 (W.D. Va. Nov. 30, 2010). The Fourth Circuit granted that joint motion and a parallel motion filed in *Liberty University*, and it has scheduled argument in both appeals for May 10.

ARGUMENT

The parties are currently briefing this case in the court of appeals on an expedited basis. The opening brief for the Secretary of Health and Human Services has already been filed in that court (along with 19 amici

briefs), and oral argument is scheduled to be held in approximately 60 days. Especially given the court of appeals' imminent consideration of this case, there is no basis for short-circuiting the normal course of appellate review by granting a writ of certiorari before judgment. Moreover, this case would make a poor vehicle to address the constitutionality of the Affordable Care Act's minimum coverage provision because petitioner's claim to standing rests entirely on a novel "declaratory" state statute (Pet. App. 66), and that threshold jurisdictional question could readily prevent the Court from reaching the merits of petitioner's claim. The petition should be denied.

1. Rule 11 of the Rules of this Court provides that a petition for a writ of certiorari before judgment "will be granted only upon a showing that the case is of such imperative public importance as to justify deviation from normal appellate practice and to require immediate determination in this Court." The constitutionality of the minimum coverage provision is undoubtedly an issue of great public importance. This case is not, however, one of the rare cases that justifies "deviation from normal appellate practice" and "require[s] immediate determination in this Court." Sup. Ct. R. 11.

The constitutionality of the minimum coverage provision is already under expedited review in three courts of appeals, and expedition has been sought in a fourth. The Fourth Circuit will hold argument in this case and in *Liberty University* v. *Geithner*, No. 10-2347, on May 10. The Sixth Circuit will hear oral argument in *Thomas More Law Center* v. *Obama*, No. 10-2388, during its May 30-June 10 sitting. That case presents an appeal from the decision in *Thomas More Law Center* v. *Obama*, 720 F. Supp. 2d 882 (E.D. Mich. 2010), which,

like *Liberty University*, rejected constitutional challenges to the minimum coverage provision. In *Seven-Sky* v. *Holder*, No. 11-5047 (D.C. Cir.), the United States has consented to appellants' request for expedited briefing. That case involves an appeal from the decision in *Mead* v. *Holder*, No. Civ.A. 10-950 GK, 2011 WL 611139 (D.D.C. Feb. 22, 2011), which likewise rejected constitutional challenges to the minimum coverage provision. Like *Liberty University*, the *Thomas More Law Center* and *Seven-Sky* cases involve uninsured individual plaintiffs who will be subject to the minimum coverage provision and whose standing the government does not challenge. In addition, the government has appealed the district court's decision in *Florida ex rel. Bondi* v. *United States Department of Health & Human Services*, No. 3:10-CV-91-RV/EMT, 2011 WL 285683 (N.D. Fla. Jan. 31, 2011), appeal docketed, No. 11-11021 (11th Cir. Mar. 9, 2011), cross-appeal docketed, No. 11-11067 (11th Cir. Mar. 11, 2011).[4] The Eleventh Circuit has expedited proceedings, and the case will be fully briefed on May 25.

Petitioner identifies no persuasive reason for this Court to proceed without the benefit of review by the courts of appeals. Cf. *United States* v. *Mendoza*, 464 U.S. 154, 160 (1984) (Court "benefit[s]" from allowing circuit courts to consider a question "before this Court

---

[4] In *Bondi*, the district court held that the minimum coverage provision was in excess of Congress's enumerated powers and that it was inseverable from the rest of the Act. See 2011 WL 285683 at *20-*39. On that basis, the court "declared void" the "entire Act." *Id.* at *40. The court subsequently stayed its decision pending appellate review. See *Florida ex rel. Bondi* v. *United States Dep't of Health & Human Servs.*, No. 3:10-CV-91-RV/EMT, 2011 WL 723117, at *8-*11 (N.D. Fla. Mar. 3, 2011).

grants certiorari."). The minimum coverage provision is the only provision of the Affordable Care Act that petitioner claims is unconstitutional, and it does not take effect until 2014, *i.e.*, for more than two-and-one-half years. Moreover, no court has precluded the government from preparing to implement the Affordable Care Act under the schedule Congress established. There will be ample time before 2014 for this Court to decide whether to grant review in the normal course and, if it does so, to issue a decision.

Indeed, because petitioner has not sought expedition of its request for certiorari before judgment, even were its petition granted, this case would not be heard until next Term. Given the pendency of expedited appeals in three courts of appeals (and a pending request for expedition in a fourth), see pp. 12-13, *supra*, it is possible that one of those cases could be heard next Term in the normal course. See Liberty Univ. Amicus Br. 5-6 (noting that the Fourth Circuit is among the fastest courts of appeals). Accordingly, granting certiorari before judgment in this case would not necessarily result in significantly accelerating this Court's review of the constitutionality of the minimum coverage provision. At the same time, it would have the certain downside of depriving this Court of consideration of these issues by the court of appeals.

2. Petitioner contends that this Court's review is warranted even before the courts of appeals have had the opportunity to address the constitutionality of the minimum coverage provision because petitioner must "devote considerable resources now to meet the requirements of" other provisions of the Affordable Care Act. Pet. 14; see Pet. at 14-16 (discussing alleged present burdens caused by several provisions of the Act other

than the minimum coverage provision). Petitioner has not claimed that *any* of these provisions exceed Congress's constitutional authority, and the district court did not specifically consider, let alone invalidate, them.[5] That petitioner must remain subject to those unchallenged provisions during the relatively short time necessary for orderly appellate review thus does not constitute an extraordinary circumstance warranting certiorari before judgment.

In any event, the petition provides no examples of substantial resources currently devoted to compliance with the Affordable Care Act. For example, petitioner states that it must "assess" whether to exercise the option of developing a health insurance exchange under the Act, which would otherwise be established by the federal government. Pet. 14. Petitioner also cites "complex bills" that were pending before the Virginia General Assembly. *Ibid.* Those bills, which have since been approved by the General Assembly, do not appear to

---

[5] Petitioner contends that those provisions already in effect, while not unconstitutional, are inseverable from the one provision it has challenged. The district court properly declined to declare those provisions inseverable. Pet. App. 46-49; see *Free Enter. Fund* v. *Public Co. Accounting Oversight Bd.*, 130 S. Ct. 3138, 3161 (2010) ("Generally speaking, when confronting a constitutional flaw in a statute, we try to limit the solution to the problem, severing any problematic portions while leaving the remainder intact.") (internal quotation marks and citation omitted). In any event, petitioner's sweeping contention (Pet. i) that Congress would not have wanted *any* portion of the Affordable Care Act to remain effective in the event that the minimum coverage provision were invalidated (including even those provisions "patently extraneous to health care," Pet. App. 46) is most clearly wrong with respect to provisions, like those already in effect, that Congress required to become operative before 2014, *i.e.*, years before the minimum coverage provision takes effect.

involve a significant expenditure of resources. For example, the fiscal impact statement accompanying H.B. 2434, Gen. Assemb., Reg. Sess. (Va. 2011), which declares Virginia's intent to establish a health insurance exchange, "specifies no fiscal impact" and states that "[i]t is feasible that the state may be able to design and implement an exchange with available federal grants and no state funding."[6] Notably, petitioner has already received a federal grant for exchange planning,[7] and it is currently eligible to apply for a federal grant to establish an exchange.[8] The fiscal impact statements accompanying H.B. 1928, Gen. Assemb., Reg. Sess. (Va. 2011), which requires insurers to accord policyholders certain appeal rights, and H.B. 1958, Gen. Assemb., Reg. Sess. (Va. 2011), which requires insurers to adhere to other federal requirements, report that those measures also have no fiscal impact.[9]

---

[6] See Department of Planning & Budget, *2011 Fiscal Impact Statement, HB 2434*, Va. Gen. Assemb. Legis. Info. Sys., 1 (Jan. 20, 2011), http://leg1.state.va.us/cgi-bin/legp504.exe?111+oth+HB2434F122+PDF.

[7] U.S. Dep't of Health & Human Servs., *Exchange Planning Grants: Grant Awards List*, HealthCare.gov (July 29, 2010), http://www.healthcare.gov/news/factsheets/grantawardslist.html; News Release, *Forty-eight states receive new resources to build competitive health insurance marketplaces*, HHS.gov (Sept. 30, 2010), http://www.hhs.gov/news/press/2010pres/09/20100930b.html.

[8] News Release, *HHS Announces new resources to help states implement Affordable Care Act*, HHS.gov (Jan. 20, 2011), http://www.hhs.gov/news/press/2011pres/01/20110120b.html.

[9] See State Corp. Comm'n, *2011 Fiscal Impact Statement, HB 1928*, Va. Gen. Assemb. Legis. Info. Sys., 1 (Feb. 22, 2011), http://leg1.state.va.us/cgi-bin/legp504.exe?111+oth+HB1928FER171+PDF; State Corp. Comm'n, *2011 Fiscal Impact Statement, HB 1958*, Va. Gen.

3. This case does not resemble the handful of cases in which this Court has taken the extraordinary step of granting certiorari before judgment. See Pet. 16-17, 18 (citing cases). The Court did not grant certiorari before judgment in those cases because the issues they presented "must be and will be decided in this Court," Pet. 16, but instead because of extraordinary circumstances, not present here, warranting this Court's immediate intervention outside the normal course of appellate review. In most of the cases petitioner cites, this Court granted early review because allowing review to proceed in the normal course presented risks of extraordinary disruption and irreparable harm.

For example, in *Mistretta* v. *United States*, 488 U.S. 361 (1989), the Court granted petitions for certiorari before judgment filed by both the United States and a criminal defendant to decide the constitutionality of the federal Sentencing Guidelines. *Id.* at 371. At the time of the government's petition in that case, 50 different district courts had decided the question (dividing 29-21), and further delay in final resolution of the question would have required that thousands of criminal defendants be resentenced. Pet. at 9-11, 14, *Mistretta*, *supra* (No. 87-1904). Likewise, the United States filed a petition for a writ of certiorari before judgment in *United States* v. *United Mine Workers*, 330 U.S. 258 (1947), because, absent immediate resolution by this Court, an ongoing strike at the nation's bituminous coal mines (then being operated by the United States) threatened "a decline in total employment of at least 5,000,000 full time workers" and a decline in annual national income of

---

Assemb. Legis. Info. Sys., 1 (Feb. 25, 2011), http://leg1.state.va.us/cgi-bin/legp504.exe?111+oth+HB1958FER171+PDF.

$20 billion. Pet. at 21, *United Mine Workers*, *supra* (Nos. 46-759, 46-760). The United States petitioned for a writ of certiorari before judgment (and acquiesced in a petition filed by a private party) in *Carter* v. *Carter Coal Co.*, 298 U.S. 238 (1936), because a number of district courts had enjoined collection of federal taxes under the Bituminous Coal Conservation Act of 1935, 15 U.S.C. 801 *et seq.* See U.S. Mem. at 2, *Carter Coal*, *supra* (No. 35-636); see also *Youngstown Sheet & Tube Co.* v. *Sawyer*, 343 U.S. 579, 584 (1952) (Court granted petitions for certiorari before judgment filed by the United States and a private party to review legality of federal government's ongoing seizure of the nation's steel industry); Pet. at 6, 7, *Railroad Ret. Bd.* v. *Alton R.R.*, 295 U.S. 330 (1935) (No. 34-566) (United States sought certiorari before judgment because district court had enjoined operation of federal statute "which directly affect[ed] over 1,000,000 employees and all interstate commerce carriers by railway").

Other examples cited by petitioner were cases in which the Court granted certiorari before judgment either because the case had previously been before it at an earlier stage of the proceedings[10] or because the Court had already granted review (in the normal course) in

---

[10] See *St. Louis, Kan. City & Colo. R.R.* v. *Wabash R.R.*, 217 U.S. 247, 249, 251 (1910) (certiorari before judgment granted where "question involve[d] the construction of a prior decree of a United States Circuit Court, affirmed by this court"); see also James Lindgren & William P. Marshall, *The Supreme Court's Extraordinary Power to Grant Certiorari Before Judgment in the Court of Appeals*, 1986 Sup. Ct. Rev. 259, 270 (explaining grant of certiorari in *St. Louis Railroad* on that basis).

another case presenting the same or a similar issue.[11] Neither of those circumstances is presented here.

4. Even assuming *arguendo* that the standards for certiorari before judgment were otherwise satisfied in this case, this petition should be denied because of a threshold standing question that could readily prevent the Court from reaching the merits.

Virginia has claimed that only one provision of the Affordable Care Act is unconstitutional: the minimum coverage provision. That provision applies only to individuals and imposes no duties on Virginia or other States. Insofar as Virginia asserts any cognizable rights, they are the purported rights of its residents not to be subject to the minimum coverage provision. This Court's precedents, however, foreclose a suit by a State against the federal government "to protect her citizens from the operation of federal statutes." *Massachusetts* v. *EPA*, 549 U.S. 497, 520 n.17 (2007); see also *Alfred L. Snapp & Son, Inc.* v. *Puerto Rico*, 458 U.S. 592, 610 n.16 (1982) ("[a] State does not have standing as *parens*

---

[11] See *Gratz* v. *Bollinger*, 539 U.S. 244, 259-260 (2003) (Court granted certiorari before judgment because addition of second case to one already pending would permit Court to "address the constitutionality of the consideration of race in university admissions in a wider range of circumstances"); *New Haven Inclusion Cases*, 399 U.S. 392, 418 (1970) (certiorari before judgment granted because Court had noted probable jurisdiction under its appellate jurisdiction in closely related case); *Porter* v. *Dicken*, 328 U.S. 252, 254 (1946) (certiorari before judgment granted because of "the close relationship of the important question raised to the question presented in" another case in which certiorari had been granted in the normal course); *United States* v. *Bankers Trust Co.*, 294 U.S. 240, 243 (1935) (Court granted United States' petition for certiorari before judgment where another case presenting same issue was already pending before the Court); see U.S. Pet. at 4, *Bankers Trust Co.*, *supra* (Nos. 34-471, 34-472).

patriae to bring an action against the Federal Government") (citing *Massachusetts* v. *Mellon*, 262 U.S. 447, 485-486 (1923), and *Missouri* v. *Illinois*, 180 U.S. 208, 241 (1901)).

Petitioner attempts to circumvent this longstanding limitation on state standing to sue the United States by relying on Virginia Code Annotated § 38.2-3430.1:1 (Supp. 2010), which was enacted shortly before the Affordable Care Act was signed into law. That state statute declares that no Virginia resident "shall be required to obtain or maintain a policy of individual insurance coverage except as required by a court or the [Virginia] Department of Social Services." *Ibid.* It grants the Commonwealth and its Attorney General no power of enforcement, and petitioner has not suggested that the statute serves any function other than as an effort to create standing in this case that petitioner indisputably would otherwise lack. Indeed, the statute exempts entities other than the federal government, allowing a higher education institution, for example, to require health insurance as a condition of enrollment. *Ibid.*

Nonetheless, the district court, while acknowledging that the state statute is wholly "declaratory," reasoned that petitioner may bring this suit "to defend the Virginia Health Care Freedom Act from the conflicting effect of an allegedly unconstitutional federal law." Pet. App. 66. Contrary to the district court's reasoning, however, petitioner cannot avoid the bar to a State's standing to assert the rights of its citizens in a suit against the United States by enacting a statute that codifies its legal claim. Regardless of whether petitioner's disagreement with federal law is framed in a complaint or proclaimed in a legislative declaration, its suit impermissibly calls upon the courts "to adjudicate, not rights of person or

property, not rights of dominion over physical domain, not quasi-sovereign rights actually invaded or threatened, but abstract questions of political power, of sovereignty, of government." *Mellon*, 262 U.S. at 484-485; see also *New Jersey* v. *Sargent*, 269 U.S. 328, 337 (1926) (allegation that provisions of federal law "go beyond the power of Congress and impinge on that of the State * * * do not suffice as a basis for invoking an exercise of judicial power").

Comparison with cases in which this Court has found state standing in actions against the federal government demonstrates that this case is not justiciable. For example, in *Massachusetts* v. *EPA*, the Court held that the State could challenge EPA's failure to regulate greenhouse gas emissions because "rising seas," caused in part by these emissions, would injure Massachusetts "in its capacity as a landowner" and "have already begun to swallow Massachusetts' coastal land." 549 U.S. at 522-523. A State likewise may challenge a measure that commands the State itself to take action, *e.g.*, *New York* v. *United States*, 505 U.S. 144 (1992) (federal law required state to take title to nuclear waste or enact federally approved regulations), or that prohibits specified state action, *e.g.*, *Oregon* v. *Mitchell*, 400 U.S. 112 (1970) (federal law prohibited States from using literacy tests or durational residency requirements in elections).

This case challenging the minimum coverage provision has none of those features, and a State cannot convert a "naked contention that Congress has usurped the reserved powers of the several States," *Mellon*, 262 U.S. at 483, into a justiciable controversy by passing a statute that declares federal law unenforceable against the citizens of that State. This Court stressed in *Massachusetts* v. *EPA* that "there is a critical difference between

allowing a State 'to protect her citizens from the operation of federal statutes' (which is what *Mellon* prohibits) and allowing a State to assert its rights under federal law (which it has standing to do)." 549 U.S. at 520 n.17 (quoting *Georgia* v. *Pennsylvania R.R.*, 324 U.S. 439, 447 (1945)); see *id.* at 547 (Roberts, C.J., dissenting) (States do not have standing to pursue "symbolic" litigation because "[t]he constitutional role of the courts * * * is to decide concrete cases—not to serve as a convenient forum for policy debates"). The only objective of the Virginia statute is "to protect her citizens from the operation of federal statutes." *Massachusetts* v. *EPA*, 549 U.S. at 520 n.17. This Court's precedents thus foreclose petitioner's invitation to adjudicate the "antagonistic assertions of right," Compl. ¶ 4, that are the sole basis for this suit.

Respondent has challenged petitioner's standing on these grounds before the court of appeals, see Gov't C.A. Br. 24-30, and this Court would benefit from having that court's considered views on the standing question before deciding whether to grant review in this case.

CONCLUSION

The petition for a writ of certiorari before judgment should be denied.

Respectfully submitted.

NEAL KUMAR KATYAL
Acting Solicitor General
TONY WEST
Assistant Attorney General
BETH S. BRINKMANN
Deputy Assistant Attorney General
MARK B. STERN
ALISA B. KLEIN
Attorneys

MARCH 2011

184

No. 10-1014

Supreme Court, U.S.
FILED
MAR 21 2011
OFFICE OF THE CLERK

In The
Supreme Court of the United States

COMMONWEALTH OF VIRGINIA,
ex rel. Kenneth T. Cuccinelli, II, in his
Official Capacity as Attorney General of Virginia,

Petitioner,

v.

KATHLEEN SEBELIUS,
Secretary of the Department of Health and
Human Services, in her Official Capacity,

Respondent.

On Petition For A Writ Of Certiorari Before Judgment To The United States Court Of Appeals For The Fourth Circuit

REPLY BRIEF OF THE PETITIONER

KENNETH T. CUCCINELLI, II
Attorney General of Virginia

E. DUNCAN GETCHELL, JR.
Solicitor General of Virginia
dgetchell@oag.state.va.us
Counsel of Record

STEPHEN R. MCCULLOUGH
Senior Appellate Counsel
smccullough@oag.state.va.us

CHARLES E. JAMES, JR.
Chief Deputy Attorney General

WESLEY G. RUSSELL, JR.
Deputy Attorney General
wrussell@oag.state.va.us

OFFICE OF THE
ATTORNEY GENERAL
900 East Main Street
Richmond, Virginia 23219
Telephone: (804) 786-2436
Facsimile: (804) 786-1991

Counsel for the
Commonwealth of Virginia

March 21, 2011

COCKLE LAW BRIEF PRINTING CO (800) 225-6964
OR CALL COLLECT (402) 342-2831

TABLE OF CONTENTS

	Page
TABLE OF AUTHORITIES	ii
INTRODUCTION	1
ARGUMENT	3
CONCLUSION	8

TABLE OF AUTHORITIES

Page

CASES

Carter v. Carter Coal Co., 298 U.S. 238 (1936).....5

Florida v. United States Department of Health & Human Services, 716 F. Supp. 2d 1120 (N.D. Fla. 2010).....4, 5

Gratz v. Bollinger, 539 U.S. 244 (2003) 4

Liberty University, Inc. v. Geithner, No. 6:10-cv-00015-nkm, 2010 U.S. Dist., LEXIS 125922 (W.D. Va. Nov. 30, 2010).....4

Mead v. Holder, No. 10-950 (GK), 2011 U.S. Dist., LEXIS 18592 (D.D.C. Feb. 22, 2011).....3

Mistretta v. United States, 488 U.S. 361 (1989) 5

New Haven Inclusion Cases, 399 U.S. 392 (1970).....5

New York v. United States, 505 U.S. 144 (1992).....7

Oregon v. Mitchell, 400 U.S. 112 (1970).....7

Railroad Retirement Bd. v. Alton Railroad Co., 295 U.S. 330 (1935).....5

Rodriguez de Quijas v. Shearson/American Express, 490 U.S. 477 (1989) 4

Rowan v. Tractor Supply Co., 559 S.E.2d 709 (Va. 2002).....7

Stauffer v. Brooks Brothers, Inc., 619 F.3d 1321 (Fed. Cir. 2010).....8

Thomas More Law Center v. Obama, 720 F. Supp. 2d 882 (E.D. Mich. 2010).....4

TABLE OF AUTHORITIES – Continued

Page

United States v. United Mine Workers, 330 U.S. 258 (1947) 5

Vermont Agency of Natural Resources v. United States, 529 U.S. 765 (2000) 7

Virginia ex rel. Cuccinelli v. Sebelius, 728 F. Supp. 2d 768 (E.D. Va. 2010) 3, 6

Youngstown Sheet & Tube Co. v. Sawyer, 343 U.S. 579 (1952) 5

STATUTES

1 U.S.C. § 7 6

8 U.S.C. § 1623 6

28 U.S.C. § 1738C 6

Virginia Code § 38.2-3430.1:1 1

RULES

S. Ct. R. 11 5

REPLY BRIEF OF THE PETITIONER

INTRODUCTION

Because of the significant constitutional issues raised and the crippling uncertainty faced by the country until those issues are resolved, Virginia seeks, pursuant to Rule 11 of the Rules of this Court, to expedite resolution of its challenge to the Patient Protection and Affordable Care Act ("PPACA"). The Secretary's opposition to Virginia's Petition is largely based on a misapprehension of the scope of the Virginia Health Care Freedom Act, Va. Code § 38.2-3430.1:1, and on a failure to recognize the significant damage that delaying final resolution of the questions will inflict upon States and others.

Contrary to the Secretary's argument, it is not true that "[t]he Virginia General Assembly enacted a statute declaring that its residents do not have to comply with a provision of" PPACA. (Br. in Opp'n. at 2). The Virginia enactment was passed at a time when no one could say whether a federal health care law would pass both houses of Congress. The Virginia Health Care Freedom Act exercises Virginia's reserved police powers to provide that no citizen of Virginia is required to purchase a policy of health insurance. Although the law contains a few narrow exceptions, it is a statute of general application, covering other entities such as employers and local governments. It is well established in this Court and in the circuit courts of appeals that the United States and the States have sovereign standing to defend

their laws. Unsurprisingly, therefore, the district court found that Virginia had standing to seek and obtain a declaration that Congress exceeded its enumerated powers in enacting PPACA. (App. at 50).

Since the filing of the Petition, the governors of Alabama, Alaska, Arizona, Florida, Georgia, Idaho, Indiana, Iowa, Kansas, Louisiana, Maine, Michigan, Mississippi, Nebraska, Nevada, New Jersey, New Mexico, North Dakota, Ohio, Pennsylvania, South Carolina, South Dakota, Tennessee, Texas, Utah, Virginia, Wisconsin and Wyoming have written to the President, reporting that every state faces significant challenges and expenses in implementing PPACA over the next several years and requesting his agreement to expedited review. http://www.governor.virginia.gov/News/docs/Governors%20Lawsuit%20Letter.pdf. In particular, these 28 governors addressed the overhang of uncertainty:

> Given the daunting and costly financial and regulatory burdens that our states and the private sector will face in implementing PPACA over the coming years, particularly during this unprecedented budgetary time, public interest requires expediting a final resolution of the litigation to give certainty as soon as possible. We should not endure years of litigation in the circuit courts, when the Supreme Court can promptly provide finality. This resolution can help prevent the states and the private sector from undertaking potentially unnecessary measures and expenses. More importantly,

> our businesses, health care providers, and citizens of our great nation need to know as soon as possible whether all or part of the law will be upheld or stricken, so they know their options and obligations.

ARGUMENT

Rule 11 of the Rules of this Court provides that a petition for a writ of certiorari before judgment "will be granted only upon a showing that the case is of such imperative public importance as to justify deviation from normal appellate practice and to require immediate determination in this Court." The Secretary concedes that "[t]he constitutionality of the minimum coverage provision is undoubtedly an issue of great public importance." (Br. in Opp'n at 12). But she questions whether this is "one of the rare cases that justifies 'deviation from normal appellate practice' and 'require[s] immediate determination in this Court.'" (*Id.*)

If this case does not satisfy that standard, it is difficult to see what case ever could. The issue is a pure question of law. Every district court that has reached the merits has rejected or declined to rule on the Secretary's taxing power argument while concluding that the claimed power under the Commerce Clause is novel or unprecedented. *Mead v. Holder*, No. 10-950 (GK), 2011 U.S. Dist., LEXIS 18592, at *55, *70-71 (D.D.C. Feb. 22, 2011); *Virginia ex rel. Cuccinelli v. Sebelius*, 728 F. Supp. 2d 768, 788

(E.D. Va. 2010) (App. 29, 44-46); *Thomas More Law Center v. Obama*, 720 F. Supp. 2d 882, 893, 895 (E.D. Mich. 2010); *Florida v. United States Department of Health & Human Services*, 716 F. Supp. 2d 1120, 1143-44, 1163 (N.D. Fla. 2010); *Liberty University, Inc. v. Geithner*, No. 6:10-cv-00015-nkm, 2010 U.S. Dist., LEXIS 125922 *30-*37, *48-*49 (W.D. Va. Nov. 30, 2010). Because PPACA cannot be upheld unless the cases of this Court marking the affirmative and negative outer limits of the Commerce Clause are extended, only this Court can definitively resolve that question. *Rodriguez de Quijas v. Shearson/American Express*, 490 U.S. 477, 484 (1989).

As a matter of timing, the Secretary argues that at least one of the cases pending in the circuit courts of appeals will possibly reach this Court next term in the ordinary course. (Br. in Opp'n at 14). But this overlooks the desirability of using Rule 11 as it was used in *Gratz v. Bollinger*, 539 U.S. 244 (2003), to ensure that a significant constitutional issue is heard on the broadest available record.

The Secretary professes to see no evidence of how Virginia is being burdened because it has not yet spent new, appropriated state funds. (Br. in Opp'n at 15-16). This, of course, is inconsistent with the Secretary's position in the Northern District of Florida where she sought clarification from the district court based upon "'the variety of statutory provisions that would be subject to disruption if . . . the declaratory judgment was anticipated to operate as an immediate injunction with respect to the

programs currently in effect.'" Defs' Mot. to Clarify at 9-13, *Florida*, 716 F. Supp. 2d 1120 (No. 3:10-cv-00091), Doc. 156. A significant number of the examples given in her motion by the Secretary involved states. *Id.* (*See also* Amicus Br. of Ass'n of American Physicians & Surgeons at 4). Furthermore, the entire nation is and will continue to be affected by uncertainty. That some private actors are suffering immediate harm has been conceded by the Secretary through her abandonment of standing challenges to individual plaintiffs in pending appeals. Mot. to Clarify, *supra*, at 14-15. (*See also* Amicus Br. of Physician Hospitals of America at 2-3).

The paradigm for a Rule 11 grant involves a constitutional challenge to federal action joined with national economic impact. PPACA is frequently described as an undertaking to regulate one-sixth of the American economy. The Secretary's argument, that constitutional challenges to such a sweeping legislative reordering of American life, is not of comparable importance to the industries, economic impact, and employment affects in *New Haven Inclusion Cases*, 399 U.S. 392 (1970); *Youngstown Sheet & Tube Co. v. Sawyer*, 343 U.S. 579 (1952); *United States v. United Mine Workers*, 330 U.S. 258 (1947); *Carter v. Carter Coal Co.*, 298 U.S. 238 (1936); *Railroad Retirement Bd. v. Alton Railroad Co.*, 295 U.S. 330 (1935), is extravagant. The national impact of resolving PPACA piecemeal over a period of years dwarfs the impact threatened by the potential delay in *Mistretta v. United States*, 488 U.S. 361 (1989).

The Secretary's argument that this case does not present a good vehicle for resolving the constitutionality of PPACA on the merits because of questions about Virginia's standing begins with a strawman. Virginia, throughout this case, has renounced any reliance on proprietary, *parens patriae* or any other form of quasi-sovereign standing. (App. at 58-60); Pl.'s Mem. in Opp'n to Mot. to Dismiss at 22-28, *Sebelius*, 728 F. Supp. 2d 768 (No. 3:10-cv-00188), Doc. 28. This makes the Secretary's discussion of these matters quite beside the point. (Br. in Opp'n at 19-22).

The Secretary's standing argument also depends upon a misconstruction of the scope, reach and effect of the Virginia statute. The statement that "the statute exempts entities other than the federal government" (Br. in Opp'n at 20) is narrowly and literally true in the sense that there are a few exceptions. But it is clearly a statute of general application applying broadly to employers and local governments as Virginia argued in the district court. (Tr. of July 1, 2010 at 47-53, *Sebelius*, Doc. 81). This renders the statement that "petitioner has not suggested that the statute serves any other function other than as an effort to create standing" (Br. in Opp'n at 20) not merely unsupported by the record but contrary to it. Nor does it matter that the Virginia law has no separate enforcement mechanism. That is true of Federal statutes as well. *See e.g.*, 1 U.S.C. § 7; 8 U.S.C. § 1623; 28 U.S.C. § 1738C. And nothing would prevent the Attorney

General from enforcing the law against a locality. Furthermore, any citizen would have a private cause of action if discharged from employment contrary to its terms. *Rowan v. Tractor Supply Co.*, 559 S.E.2d 709 (Va. 2002).

Only on the next to last page of her brief does the Secretary even discuss the true doctrinal basis for Virginia's standing: sovereign standing based upon the sovereign injury of having to give way with respect to its code of laws if the federal law is valid. (Br. in Opp'n at 21). There the Secretary concedes: "A State likewise may challenge a measure that commands the State itself to take action, *e.g.*, *New York v. United States*, 505 U.S. 144 (1992) (federal law required state to take title to nuclear waste or enact federally approved regulations), or that prohibits specified state action, *e.g.*, *Oregon v. Mitchell*, 400 U.S. 112 (1970) (federal law prohibited States from using literacy tests or durational residency requirements in elections)."

The *ipse dixit* assertion that this case "has none of those features" is simply incorrect. As demonstrated in the Petition, the sovereign standing of a state to defend its code of laws is well established in this Court and in the federal circuits. (Pet. at 7-8). Sovereign standing has also been successfully claimed by the federal government. *Vermont Agency of Natural Resources v. United States*, 529 U.S. 765, 771 (2000) ("It is beyond doubt that the complainant asserts an injury to the United States – both the injury to its

sovereignty arising from the violation of its laws . . . and the proprietary injury. . . ."); *Stauffer v. Brooks Brothers, Inc.*, 619 F.3d 1321, 1324-25 (Fed. Cir. 2010) (sovereign injury "is a sufficient injury in fact"). If sovereign standing runs in favor of the United States, there is no principled reason why it does not run in favor of the joint sovereign, Virginia. Accordingly, Virginia has standing, and the Secretary's argument that Certiorari should be denied on that basis fails.

CONCLUSION

The petition for a writ of certiorari before judgment should be granted.

Respectfully submitted,

KENNETH T. CUCCINELLI, II
Attorney General of Virginia

E. DUNCAN GETCHELL, JR.
Solicitor General of Virginia
dgetchell@oag.state.va.us
Counsel of Record

STEPHEN R. MCCULLOUGH
Senior Appellate Counsel
smccullough@oag.state.va.us

CHARLES E. JAMES, JR.
Chief Deputy Attorney General

WESLEY G. RUSSELL, JR.
Deputy Attorney General
wrussell@oag.state.va.us

OFFICE OF THE
ATTORNEY GENERAL
900 East Main Street
Richmond, Virginia 23219
Telephone: (804) 786-2436
Facsimile: (804) 786-1991

Counsel for the
Commonwealth of Virginia

March 21, 2011

184

Supreme Court, U.S.
FILED
MAR 14 2011
OFFICE OF THE CLERK

No. 10-1014

IN THE

Supreme Court of the United States

COMMONWEALTH OF VIRGINIA,
ex rel. Kenneth T. Cuccinelli, II, in his Official Capacity as Attorney General of Virginia.
Petitioner,

v.

KATHLEEN SEBELIUS,
Secretary of the Department of Health and Human Services, in her Official Capacity,
Respondent.

On Petition for a Writ of Certiorari Before Judgment to the United States Court of Appeals for the Fourth Circuit

BRIEF OF *AMICI CURIAE* ASSOCIATION OF AMERICAN PHYSICIANS AND SURGEONS, INC., DOCS 4 PATIENT CARE, JANIS CHESTER, M.D., MARK J. HAUSER, M.D., GUENTER L. SPANKNEBEL, M.D., AND GRAHAM L. SPRUIELL, M.D., IN SUPPORT OF PETITIONER

DAVID P. FELSHER
Counsel of Record
488 Madison Avenue
New York, NY 10022
(212) 308-8505
dflaw@earthlink.net

March 14, 2011

Attorney for Amici Curiae

WILSON-EPES PRINTING CO., INC. – (202) 789-0096 – WASHINGTON, D. C. 20002

QUESTIONS PRESENTED

1. In light of *Clinton v. City of New York*, should the Court overrule *Alaska Airlines v. Brock* because severance of an unconstitutional provision from a statute lacking a severability clause is a judicial line item veto?

2. Does the simultaneous enactment and revision of Section 1501 violate the Presentment Clause?

3. Does the Commerce Clause require at least a dyadic or exchange transaction?

TABLE OF CONTENTS

	Page
QUESTIONS PRESENTED	i
TABLE OF AUTHORITIES	iv
INTERESTS OF *AMICI*	1
I. THE PETITION SHOULD BE GRANTED IMMEDIATELY	3
II. THE PETITION IS "CERT. WORTHY"	7
III. SECTION 1501 IS UNCONSTITUTIONAL	9
A. Section 1501 is Not Based on Congress' Power to Regulate Commerce	9
1. The individual mandate involves no commerce	10
2. Courts may not rely on Section 1501's "findings" to establish Congressional power under the Commerce Clause	12
B. Congress May Not Violate Constitutional Constraints	14
1. Section 1501 may not be enacted and amended simultaneously	15
2. Congress may not invade a patient's privacy	18
IV. ACA IS UNCONSTITUTIONAL BECAUSE SECTION 1501 IS NOT SEVERABLE	22
CONCLUSION	25

TABLE OF AUTHORITIES

CASES Page

Alaska Airlines v. Brock, 480 U.S. 678 (1987) ..... i, 8, 22, 23
Association of American Physicians and Surgeons, Inc. v. Sebelius, Case No. 1:10-cv-0499-RJL 1
Clinton v. City of New York, 524 U.S. 417 (1998) ..... *passim*
Commonwealth of Virginia, ex rel. Cuccinelli v. Sebelius, 728 F. Supp. 2d 768 (E.D. Va. 2010), *appeals docketed*, Nos. 11-1057 & 1058 (4th Cir.) ..... *passim*
Florida v. United States Department of Health and Human Services, (N.D. Fl.), Case No.: 3:10-cv-91, *appeal docketed*, 11-11021-HH (11th Cir.) ..... *passim*
Free Enter. Fund v. Pub. Co. Accounting Oversight Bd., 130 S.Ct. 3138 (2010) 8
Gibbons v. Ogden, 22 U.S. (9 Wheat.) 1 (1824) 11
Immigration and Naturalization Service v. Chadha, 462 U.S. 919 (1983) 15, 23
Liberty University v. Geithner, __ F. Supp. 2d __, 2010 WL 4860299 (W.D. Va. Nov. 30, 2010), *appeal docketed*, No.10-2347 (4th Cir.) 4, 5, 9
Marbury v. Madison, 5 U.S. (1Cr.) 137 (1803) 13
McCulloch v. Maryland, 17 U.S. (4 Wheat.) 316 (1819) 9
Mead v. Holder, __ F.Supp.2d ___, 2011 WL 611139 (D.D.C.), *appeal docketed*, 11-5047 (D.C. Cir.) 4, 5, 9

TABLE OF AUTHORITIES—Continued

Page

Miranda v. Arizona, 384 U.S. 436 (1966) 7, 20, 21, 22
Murphy v. Waterfront Commission of New York Harbor, 378 U.S. 52 (1964) 20
New York v. U.S. 505 U.S. 144 (1992) 22
O'Connor v. Ortega, 480 U.S. 709 (1987) 20
Oklahoma v. Sebelius, Case No.: 6:11-cv-00030 (E.D. Ok.) 4
Silverman v. United States, 365 U.S. 505 (1961) 20
Stenberg v. Carhart, 530 U.S. 914 (2000) 1
Tehan v. United States ex rel. Shott, 382 U.S. 406 (1966) 20
Thomas More Law Center v. Obama, 720 F.Supp. 2d 882 (E.D. Mi. 2010), *appeal docketed*, No. 10-2388 (6th Cir.) 4, 5, 6, 9
United States v. Grunewald, 233 F.2d 556 (2d Cir. 1956), *rev'd* 353 U.S. 931 (1957) 19, 20, 21
United States v. Lopez, 514 U.S. 549 (1995) .. 11
United States v. Morrison, 529 U.S. 598 (2000) 9
United States v. On Lee, 193 F.2d 306 (2d Cir. 1951), *aff'd*, 343 U.S. 747 (1952) 19, 20
United States v. Westinghouse Electric Corp., 638 F.2d 570 (3d Cir. 1980) 7, 18-19

CONSTITUTION

U.S. CONST. art. I, sec. 1, cl. 1 ..... 8, 24
U.S. CONST. art. I, sec. 7 9
U.S. CONST. art. I, sec. 7, cl. 2 ..... *passim*
U.S. CONST. art. I, sec. 8 10
U.S. CONST. art. I, sec. 8, cl. 3 ..... *passim*

TABLE OF AUTHORITIES—Continued

Page

U.S. CONST. art. I, sec. 9 9
U.S. CONST. amend. IV 20
U.S. CONST. amend. V 20

STATUTES

26 U.S.C. § 5000A 15, 16
Health Care and Education Reconciliation Act of 2010, Pub. L. 111-152, 124 Stat. 1029 ..... 2, 17
Patient Protection and Affordable Care Act, Pub. L. 111-148, 124 Stat. 119 (2010) ..... *passim*
§ 1501 ..... *passim*
§ 1501(a) 12
§ 1501(a)(2)(E) 13, 14
§ 1502 18
§ 10106 ..... 13, 14, 15, 16
§ 10106(a) 12

CONGRESSIONAL MATERIALS

Brief of Senators Robert C. Byrd, Daniel Patrick Moynihan, and Carl Levin as *Amici Curiae* in Support of Appellees 9-10 in *Clinton v. City of New York* (Docket No. 97-1374) 23-24
H. Res. 74 (112th Cong., 1st Sess.) 3
H. Res. 76 (112th Cong., 1st Sess.) 3
H. R. 3590 (111th Cong.) 15, 17, 24
H. R. 4872 (111th Cong.) 17
U.S. Congress, Office of Technology Assessment, *Protecting Privacy in Computerized Medical Information*, OTA-TCT-576 (U.S. G.P.O., Sept. 1993) 18

TABLE OF AUTHORITIES—Continued

RULES

S. Ct. R. 11 1

OTHER AUTHORITIES

Abraham Lincoln, Speech of June 16, 1858 (Springfield, Ill.) *reprinted in* Yale Book of Quotations 460 (F.R. Shapiro ed. 2006) 7
Albert Einstein, *The Meaning of Relativity* (5th ed. 1956) 11
Daniel Huff, *How to Lie with Statistics* (1954) 13, 14
Empire BlueCross/BlueShield Form ENR-02968 (Rev 1/11) 21
Ernst & Young, LLP, *Summary of the Patient Protection and Affordable Care Act, incorporating The Health Care and Education Reconciliation Act* (May 2010) 17
Euclid, *Elements of Geometry* (Greek Text of J. L. Heiberg (1883-1885)) (R. Fitzpatrick, ed. & translator) 10-11
GAO, *PRIVACY: Domestic and Offshore Out-sourcing of Personal Information in Medicare, Medicaid, and TRICARE,* Report No. 06-676 (Sept. 2006) 21-22
James Madison, THE FEDERALIST No. 62, (C. Rossiter, ed. 1961) 16, 17
Mark Ryan, *Geometry for Dummies* (2008). 11
Mark Twain, *Life on the Mississippi* (1883) 13-14
Michael O. Leavitt, *Health reform's central flaw: Too much power in one office,* Washington Post (February 18, 2011) 17
Paul A. Samuelson, *Economics* (10th ed., 1976) 11

INTERESTS OF *AMICI* [1]

Amici Curiae ("*Amici*") are individual physicians and two associations of physicians whose memberships span the nation. *Amici* file this brief in support of Petitioner.

Since 1943, *Amicus* Association of American Physicians and Surgeons, Inc. ("AAPS") has been dedicated to the highest ethical standards of the Oath of Hippocrates and to preserving the sanctity of the patient-physician relationship. AAPS has filed numerous *amicus curiae* briefs in noteworthy cases like this one. *See, e.g, Stenberg v. Carhart*, 530 U.S. 914 (2000) (citing an AAPS *amicus* brief). Because AAPS has also commenced an action against the Respondent which contains overlapping allegations of unconstitutionality, the disposition of this Petition may affect the rights of AAPS and its members. *Association of American Physicians and Surgeons, Inc. v. Sebelius*, Case No. 1:10-cv-0499-RJL.

Amicus Docs 4 Patient Care is an organization of concerned physicians committed to the establishment of a health care system that preserves the sanctity of the doctor-patient relationship, promotes the quality of care, supports affordable access to all Americans, and protects patients' freedom of choice.

Amicus Guenter L. Spanknebel, M.D., privately practiced gastroenterology. He is a past president of

---

[1] No counsel for a party authored this brief in whole or in part. No person or entity other than *amici curiae* or their counsel made a monetary contribution to the preparation or submission of this brief. Counsel of Record for both parties received notice at least ten days prior to the due date of *amici curiae*'s intention to file this brief. Petitioner and Respondent consented to the filing of this Brief. Those consents are filed with the Court.

the Massachusetts Medical Society and is currently chair of its History Committee. He has also served as a Trustee of the Health Foundation of Central Massachusetts and on the faculties of the medical schools at Tufts University and the University of Massachusetts.

Amicus Janis Chester, M.D., privately practices psychiatry in Delaware, serves as chair of the Department of Psychiatry at a community hospital, is a member of the faculty at Jefferson Medical College and holds a variety of positions with organized medicine and psychiatry, locally and nationally.

Amicus Mark J. Hauser, M.D. privately practices psychiatry and forensic psychiatry in Massachusetts and Connecticut.

Amicus Graham Spruiell, M.D., privately practices forensic psychiatry and psychoanalysis in the Boston area.

Amici have followed attempts in recent years to enact health care reform legislation. As active members of the medical profession and pursuant to their ethical obligations, *Amici* have carefully studied the introduction, passage and partial early implementation of the Patient Protection and Affordable Care Act, Pub. L. 111-148, 124 Stat. 119 (2010) ("ACA"), *amended by* Health Care and Education Reconciliation Act of 2010, Pub. L. 111-152, 124 Stat. 1029 ("RA").

For the reasons set forth below, *Amici* believe ACA is unconstitutional. If upheld, ACA will undermine, in fundamental and dangerous ways, the practice of medicine and harm patients. *Amici* submit this brief in support of the Petitioner and urge the Court to grant *certiorari*.

I. THE PETITION SHOULD BE GRANTED IMMEDIATELY

ACA has divided our nation prior to enactment, during enactment and since enactment.

The Commonwealth of Virginia ("Petitioner") has challenged the constitutionality of the individual mandate contained in Section 1501 of ACA ("Section 1501") and of ACA itself. The United States District Court for the Eastern District of Virginia held Section 1501 is unconstitutional and severable from the remainder of ACA. Both parties appealed. *Commonwealth of Virginia, ex rel. Cuccinelli v. Sebelius*, 728 F. Supp. 2d 768 (E.D. Va. 2010) ("*Virginia Action*"), *appeals docketed*, Nos. 11-1057 & 1058 (4th Cir.) ("*Virginia Appeal*"). Virginia filed its Petition under Rule 11.

Both parties acknowledged the urgency of this matter by jointly asking for expedited oral argument before the Fourth Circuit. According to both Petitioner and Respondent, "the constitutionality of the Affordable Care Act has public policy implications of the **highest magnitude**." Joint Motion to Expedite Briefing and to Schedule Oral Argument for May 2011, *Virginia Appeal*, at 3 (emphasis added).[2] The motion was granted. Order, dated January 26, 2011, *Virginia Appeal*, ("*Scheduling Order*").

Besides Petitioner, twenty-seven states have challenged Section 1501's and ACA's constitutionality. Twenty-six states are plaintiffs in *Florida v. United States Department of Health and Human Services*, (N.D. Fl.), Case No.: 3:10-cv-91 ("*Florida Action*")

---

[2] *See also*, H. Res. 74 & 76 (112th Cong., 1st Sess.) (both resolutions urge judiciary to expedite consideration of ACA's constitutionality).

where the court declared Section 1501 to be unconstitutional and not severable from the remainder of ACA.[3] *Florida Action*, Doc 151. Conversely, in *Liberty University v. Geithner*, __ F. Supp. 2d __, 2010 WL 4860299 (W.D. Va. Nov. 30, 2010) ("*Liberty Action*"), *appeal docketed*, No.10-2347 (4th Cir.) ("*Liberty Appeal*")[4], *Thomas More Law Center v. Obama*, 720 F.Supp. 2d 882 (E.D. Mi. 2010) ("*TMLC Action*"), *appeal docketed*, No. 10-2388 (6th Cir.) ("*TMLC Appeal*"), and *Mead v. Holder*, __ F.Supp. 2d ___, 2011 WL 611139 (D.D.C.) ("*Mead Action*"), *appeal docketed*, 11-5047 (D.C. Cir.) ("*Mead Appeal*"), the courts found Congress has power to enact Section 1501 under the Commerce Clause. In total, more than twenty cases have been commenced challenging ACA and its provisions. Plaintiffs/Appellants Petition for Initial *En Banc* Hearing, *Mead Appeal*, at 8 ("*Mead En Banc* Petition").

As co-defendant in the *Florida Action*, Respondent underscored her need for prompt judicial action regarding Section 1501's constitutionality and its severability from ACA. Memorandum in Support of Defendants' Motion to Clarify, *Florida Action*, Document ("Doc") 156 ("*Clarification Motion*"). "The importance of clarification is underscored by the variety of statutory provisions that would be subject to disruption if, contrary to defendants' understandding, the declaratory judgment was anticipated to operate as an immediate injunction with respect to the programs currently in effect." *Id.* at 7. In footnote 2, Respondent and her co-defendants argued

---

[3] Oklahoma has recently commenced a separate action. *Oklahoma v. Sebelius*, Case No.: 6:11-cv-00030 (E.D. Ok.).

[4] The Fourth Circuit ordered the *Virginia Appeal* to be heard *in seriatum* with the *Liberty Appeal*. *Scheduling Order*.

the need for swift resolution of the issues in the *Florida Action* and pointed to this case. "Appellate review of the decisions that were issued prior to this Court's judgment is already proceeding on an **expedited basis**." *Id. at* 3 n.2 (referencing *Virginia*, *Liberty*, and *TMLC Appeals*) (emphasis added).[5] In response to the Clarification Motion, Judge Vinson said: "the sooner the issue [of ACA's constitutionality] is finally decided by the Supreme Court, the better off the entire nation will be." Order, *Florida Action* Doc 167 at 18 ("*Clarification Order*"). In construing the *Clarification Motion* as a motion for a stay, he granted Defendants a stay conditioned upon an appeal being filed within seven calendar days of the *Clarification Order* and "seeking expedited appellate review, either in the Court of Appeals or with the Supreme Court under Rule 11 . . . ." *Clarification Order* at 19. Defendants, including Respondent, timely appealed to the Eleventh Circuit for expedited review. Appellants' Motion for Expedition, *appeal docketed*, 11-11021-HH (11th Cir.) ("*Florida Appeal*"). Their motion was granted.

Amici acknowledge that typically the Supreme Court benefits by having issues and laws processed through the filter of the Courts of Appeals. Atypically, the issues in this case and the other cases challenging ACA have been extraordinarily well-briefed below. Among *amici* submitting briefs are

---

[5] Respondent concurred with Appellants' Unopposed Motion to Expedite Appeal, *TMLC Appeal*, Doc 006110858182. The *Mead* Appellants have also sought to expedite the appellate process by requesting the Court of Appeals to sit *en banc*. *Mead En Banc* Petition.

three former Attorneys General of the United States[6], three Nobel Laureates in Economics[7], several states[8], numerous state legislators opposing the *Florida Action*[9], governors[10], members of the United States Senate[11] and House of Representatives[12], and numerous other organizations representing patients, physicians, hospitals and others.[13]

In addition to Section 1501, *Amici* believe that ACA contains scores of unconstitutional provisions which are not severable from the remainder of ACA.[14]

---

[6] *Virginia Action* Doc 151 (Attorneys General Barr, Meese, and Thornburgh).

[7] *Florida Action* Doc 125 (Nobel Laureates Arrow, Akerlof, and Maskin).

[8] *Florida Action* Doc 130 (Oregon, Iowa, Vermont, Maryland and Kentucky)

[9] *Florida Action* Doc 126 (Brief filed by state legislators from 27 states).

[10] *Florida Action* Doc 133 (Governors Gregoire, Ritter, Granholm and Rendell); Doc 132 (Governors Pawlenty and Carcieri).

[11] Brief of Senate Majority Leader Harry Reid [*et al.*] in Support of Appellees . . . , *TMLC Appeal* ("*Dellinger Brief*"); *Florida Action* Doc 121 (Brief filed in support of Plaintiffs by Senator McConnell *et al.*).

[12] *Florida Action* Doc 119 (Current Speaker Boehner); *Florida Action* Doc 122 (Submitted by approximately sixty members of the House); Former Speaker Pelosi and several other Representatives were also listed as *amici* on the *Dellinger Brief*.

[13] Too numerous to specify.

[14] These provisions, including Section 1501, violate Article I, Section 7, Clause 2 of the Constitution ("Presentment Clause") because they were simultaneously enacted and amended. *See* Section III, B, 1, *infra*. Furthermore, the test for severability should be reexamined because severance of an unconstitutional provision from a statute lacking a severability clause is a

Consequently, quickly deciding ACA's constitutionality would unburden the federal Judiciary and Executive as well as the states from unnecessary and costly litigation. Assuming *arguendo* ACA is unconstitutional, delaying *certiorari* would cost the Treasury billions of dollars in unauthorized appropriations. During the delay, states, consumers, employers and others would spend additional billions of dollars to comply with an unconstitutional statute.

The Court should remember Lincoln's words: "[a] house divided against itself cannot stand." Speech of June 16, 1858 (Springfield, Ill.) *reprinted in* Yale Book of Quotations 460 (F.R. Shapiro ed. 2006). Granting *certiorari* immediately would accelerate our nation's healing by providing certainty regarding the constitutionality of Section 1501 and ACA.

II. THE PETITION IS "CERT. WORTHY"

Amici believe Congress lacks power to enact Section 1501 for two reasons. First, there is no power to regulate commerce because there is no commerce. *See* U.S. CONST. art. I, sec. 8, cl. 3 ("Commerce Clause"). Second, Section 1501 fails to comply with the Constitution's procedural requirements and substantive restrictions. Procedurally, Congress violated the Presentment Clause by simultaneously enacting and amending Section 1501. Substantively, Section 1501 invades the "private enclave" enjoyed by patients since the time of Hippocrates. *See United States v. Westinghouse Electric Corp.*, 638 F.2d 570 (3d Cir. 1980); *Miranda v. Arizona*, 384 U.S. 436 (1966).

---

judicial line item veto, a judicial remedy which itself violates the Presentment Clause. *See* Section IV, *infra*.

Respondent's argument that Section 1501 is severable from ACA cannot succeed. Congress has declared and Respondent has argued Section 1501 is "essential" to ACA. Furthermore, even if Respondent could establish Section 1501's severability under *Alaska Airlines v. Brock*, 480 U.S. 678 (1987), severance (from a statute lacking a severability clause) is a judicial line item veto that transfers legislative power from Congress to the judiciary in violation of the Bicameral and Presentment Clauses – ignoring the principles set forth in *Clinton v. City of New York*, 524 U.S. 417 (1998). Severance is not, as previously held by this Court, a doctrine of judicial restraint. *Cf.* Order Granting Summary Judgment, *Florida Action*, Doc 150 at 64; Memorandum Opinion, *Virginia Action*, Doc 161 at 40.

> The Court observed that "[s]everability is a doctrine of judicial restraint," and that "just this past year," the Supreme Court reaffirmed that courts should "try to limit the solution to the problem," severing any problematic portions while leaving the remainder intact," and that the normal rule is that partial invalidation is proper. Op. 64 (quoting *Free Enter. Fund v. Pub. Co. Accounting Oversight Bd.*, 130 S.Ct. 3138, 3161 (2010).

Clarification Motion at 3. Rather, severance is a doctrine of judicial activism that allows, and possibly even encourages, constitutional sloppiness by Congress and the President. In light of *Clinton*, *Amici* suggest *Alaska Airlines* and its progeny should be overruled.

III. SECTION 1501 IS UNCONSTITUTIONAL

"Every law enacted by Congress must be based on one or more of its powers enumerated in the Constitution." *United States v. Morrison*, 529 U.S. 598, 607 (2000); *McCulloch v. Maryland*, 17 U.S. (4 Wheat.) 316, 405 (1819). Those powers are constrained by the Constitution's procedural requirements, *see e.g.*, U.S. CONST., art. I, sec. 7, and substantive restrictions, *see e.g.*, *Id. at* sec. 9.

A. Section 1501 is Not Based on Congress' Power to Regulate Commerce

Respondent has argued that Congress may enact Section 1501 under the Commerce Clause. Because Section 1501 does not involve any commerce, her argument fails.

Since ACA was enacted last year, the question of whether Congress has the power to enact Section 1501 under the Commerce Clause has arisen in many cases. Section 1501 was upheld in the *Liberty, Mead* and *TMLC Actions* but was declared unconstitutional in the *Florida* and *Virginia Actions*.[15]

Given the disparity of the opinions and the gravity of the issue, the question of Congressional power to enact Section 1501 should be decided by this Court. *Amici* offer the following analysis to the Court.

---

[15] The courts in the *Florida* and *Virginia Actions* disagreed on whether Section 1501 is severable from ACA. The *Virginia Action* held Section 1501 is severable. The *Florida Action* held it is not severable.

1. The individual mandate involves no commerce

Congress lacks power to enact Section 1501 under the Commerce Clause. The language and structure of article I, section 8 make this clear. Under clause 3, the power is "to regulate" and the object of that power is "commerce". The Constitution does not give Congress power to regulate all commerce. Rather, the Constitution restricts Congress to regulating a set of only three types of commerce: (1) "with" the Indians; (2) "among" the several States; and (3) "with" foreign nations. All three members of this set necessarily involve at least a dyad or pair of parties. Without two or more parties, the words "with" and "among" are meaningless.

Therefore, in deciding this matter, the Court should undertake a two-step analysis. First, it should determine if Congress attempted to regulate "commerce." Only if this question is answered affirmatively, should the Court undertake step two, an analysis of the "interstate commerce" sub-clause.

With regard to step one, the key is to understand that "commerce" may be viewed as the interrelationship, traffic, agreement or transaction between parties. For example, we may see vendors paired with vendees; sellers paired with buyers; lessors paired with lessees; borrowers paired with lenders; and debtors paired with creditors. Expressed in mathematical terms, "commerce" is Euclid's line between two points or Einstein's interval between two points on an ideal rigid body, where the points represent the two parties and the line or interval represents the commercial transaction, agreement, traffic or interrelationship. Euclid, *Elements of Geometry* 6 (Greek Text of J. L. Heiberg (1883-1885))

(R. Fitzpatrick, ed. & translator) ("And the extremities of a line are points"); Albert Einstein, *The Meaning of Relativity* 4 (5th ed. 1956) (posthumously); Mark Ryan, *Geometry for Dummies* 22-23 (2008); *cf.*, Paul A. Samuelson, *Economics* 3 (10th ed., 1976) (Similar to the definition of commerce, "economics" is defined as requiring at least a dyadic relationship. "Economics . . . is the study of those activities which, with or without money, involve **exchange transactions among people**") (emphasis added).[16]

This Court has long understood and still understands that "commerce", by definition, necessarily involves two or more parties.

> The commerce power "is the power to **regulate**; that is, to prescribe the rule by which commerce is to be governed . . ." The *Gibbons* Court, however, acknowledged that limitations on the commerce power are inherent in the very language of the Commerce Clause.
>
> > It is not intended to say that these words comprehend that commerce, which is completely internal, which is ***carried on between man and man*** in a State, or between different parts of the same State, and which does not extend to or affect other States. . . .

United States v. Lopez, 514 U.S. 549, 553 (1995) (*quoting Gibbons v. Ogden*, 22 U.S. (9 Wheat.) 1, 194-95 (1824) (Marshall, Ch. J.) (emphasis added).

---

[16] Professor Samuelson's treatise was the most popular economics textbook of the second half of the twentieth century. He was Economic Advisor to President Kennedy and received the second Nobel Prize in Economics in 1970. Apparently, the 111th Congress, Respondent and *amici* who support her, ignore Samuelson's definition of "economics" in order to establish "substantial economic effects."

While "commerce" may occur between two people, between two entities, or between a person and an entity, there is no "commerce" when a single person or entity is involved. Since Section 1501 is an individual mandate, it does not pertain to a transaction, agreement, traffic or interrelationship between two parties. Rather Section 1501 attempts to regulate individuals **where no counterparty exists**. The individual mandate involves no "commerce". Without "commerce", there is no need to examine the interstate commerce sub-clause.

2. Courts may not rely on Section 1501's "findings" to establish Congressional power under the Commerce Clause

Amici believe the "substantial effects" test leads to false positive results and should not be the sole basis to establish Section 1501's constitutionality under the Commerce Clause.

Respondent has pointed to a litany of Congressional "findings" to argue that Congress properly enacted Section 1501 under the Commerce Clause – on the basis that the lack of adequate insurance coverage has a substantial effect upon the economy. Defendant's Motion for Summary Judgment, *Virginia Action*, Doc 91, at 4, 7, 8, 11-13, 15-16, 21, 26-27, 33 (pointing to findings in §§ 1501(a) & 10106(a). Applying this rationale, a court could easily find the other enumerated powers of Congress superfluous. The powers to declare war, establish post offices, and provide exclusivity for inventors obviously have substantial economic effects. Under Respondent's theory, these clauses are unnecessary.

While a court may refer to Congressional findings to support its conclusion that Congress has power to enact a provision, a court must be able to examine Congressional "findings" if judicial review is to have any meaning.[17] No deference is warranted. In this case, Congress presented findings which were based on numerous assumptions and extrapolations, some of which contradict each other. *Compare* Sections 1501(a)(2)(E) *and* 10106.

Whenever Congress presents "findings", those so-called "findings" are not facts at all, but rather something else – a conclusion based on a vote. Congressional "findings" often involve numerous extrapolations based on a plethora of assumptions. More than a century ago, Mark Twain humorously expressed the dangers of extrapolation as follows:

> In the space of one hundred and seventy-six years the Lower Mississippi has shortened itself two hundred and forty-two miles. That is an average of a trifle over one mile and a third per year. Therefore, any calm person, who is not blind or idiotic, can see that in the Old Oolitic Silurian Period, just a million years ago next November, the Lower Mississippi River was upward of one million three hundred thousand miles long, and stuck out over the Gulf of Mexico like a fishing-rod. And, by the same token any person can see that seven hundred and forty-two

---

[17] When a court blindly accepts Congressional findings as facts, it amounts to a dereliction of its duties. Long ago, this Court said: "[i]t is emphatically the province and duty of the judicial department to say what the law is." *Marbury v. Madison*, 5 U.S. (1Cr.) 137, 177 (1803). It is not free to "close [its] eyes on the Constitution, and see only the law, [*e.g.* ACA]." *Id.* at 178.

> years from now the Lower Mississippi will be only a mile and three-quarters long. . . .

Daniel Huff, *How to Lie with Statistics* 142 (1954) (*quoting* Mark Twain, *Life on the Mississippi*).

Saying something is a fact does not make it so. For example, under Section 1501(a)(2)(E), Congress made the following finding: "Half of all personal bankruptcies are caused in part by medical expenses . . . ." In Section 10106 (which amended Section 1501), Congress made the following contradictory finding: "62 percent of all personal bankruptcies are caused in part by medical expenses. . . ." It is impossible for both "findings" to be true. Perhaps, neither is true.

Considering this internal contradiction and the inherent dangers associated with extrapolating a decade into the future, *Amici* respectfully suggest that the Court not defer to the Congressional findings in Section 1501 to establish the power of Congress to enact the individual mandate. The Court should question the validity of the underlying assumptions and extrapolations.

B. Congress May Not Violate Constitutional Constraints

It is axiomatic that a federal law must comply with the entire Constitution as amended. ACA has not come close. As physicians, *Amici* are concerned by the mandated invasion of patient privacy required by ACA. As citizens, *Amici* are concerned that Congress repeatedly violated the Presentment Clause by simultaneously enacting and amending many of ACA's provisions, including Section 1501. Therefore, the Court should grant the Petition and ultimately declare Section 1501 unconstitutional.

1. Section 1501 may not be enacted and amended simultaneously

Congress has simultaneously enacted Sections 1501 and 10106 of ACA. The former provision creates 26 U.S.C. § 5000A, 124 Stat. at 244, while the latter provision revises some portions of 26 U.S.C. § 5000A, 124 Stat. at 909. These provisions contain incompatible definitions of "penalty amount".

Congress may not simultaneously enact and revise any provision within the same statute because that simultaneity violates the Presentment Clause, the "single, finely wrought and exhaustively considered, procedure" which is used to enact Federal legislation. *Immigration and Naturalization Service v. Chadha*, 462 U.S. 919, 951(1983); *Clinton*, 524 U.S. at 439-440.

Although simultaneously enacting and revising 26 U.S.C. § 5000A may have led to needless complexity, incongruity, and ambiguity for our citizenry and judiciary, the critical constitutional problem is that both the original and revised versions of Section 5000A were presented to the President at the same time Consequently, 26 U.S.C. § 5000A did not exist at the times the House and Senate passed H.R. 3590 nor did it exist when H.R. 3590 was presented to the President. Consequently, Section 10106 merely attempts to amend a nullity. For 26 U.S.C. § 5000A to be revisable, Section 10106 must be enacted after section 1501, not simultaneously with it.

Under the Presentment Clause, the President may only approve or veto a bill in its entirety. Because Sections 1501 and 10106 contained incompatible definitions of "penalty amount", it is impossible for the President to have approved H.R. 3590 (which

became ACA) in its entirety. The President's approval of the definition in 1501 contradicted the definition presented to him in 10106 and the President's approval of the definition in 10106 contradicted the definition in 1501. The incompatible definitions of "penalty amount" contained in Sections 1501 and 10106 prevent the House and Senate from having agreed on the definition of penalty amount. In other words, the House's definition under 1501 negated the Senate's definition under 10106 and the House's definition under 10106 negated the Senate's definition under 1501.

"[R]epeal of statutes, no less than enactment, must conform to Art. I." *Clinton*, 524 U.S. at 438. The same principle applies to revisions and amendment of statutes. Consequently, 26 U.S.C. § 5000A should not have been enacted and revised within the same statute. This unconstitutional practice completely infects ACA. Indeed, pursuant to Title X, Congress attempted to simultaneously enact and amend more than ninety ACA provisions.[18]

During debate over the Constitution's ratification, James Madison stated laws should be understandable, not too long, and "not be revised before they are promulgated." THE FEDERALIST No. 62, at 381 (Madison) (C. Rossiter, ed. 1961). He wrote:

> The internal effects of a mutable policy are still more calamitous. It poisons the blessings of liberty itself. It will be of little avail to the people that the laws are made by men of their own choice if the laws be so **voluminous that they cannot be read, or so incoherent that they cannot be understood; if they be**

[18] 124 Stat. at 883-1024.

> **repealed or revised before they are promulgated,** or undergo such incessant changes that no man, who knows what the law is today, can guess what it will be tomorrow. Law is defined to be a rule of action; but how can that be a rule, which is little known, and less fixed?

Id. (emphasis added). Congress ignored Madison's warning and passed H.R. 3590, a 2400 page bill, which became ACA upon the President's signature. Within days of passing ACA, Congress also passed H.R. 4872 which became the Reconciliation Act. RA.

Given ACA's length and the number of simultaneously enacted and amended provisions, James Madison surely would have considered ACA too long and too incoherent to be understood. Indeed, ACA's length and complexity have not gone unnoticed. *See Clarification Order* at 16 ("[ACA], as previously noted, is obviously very complicated and expansive. It contains about 450 separate provisions with different time schedules for implementation."); *see also*, Michael O. Leavitt, *Health reform's central flaw: Too much power in one office*, Washington Post (February 18, 2011) (referring to nearly 2000 powers given to Respondent by ACA); *see also*, Ernst & Young, LLP, *Summary of the Patient Protection and Affordable Care Act, incorporating The Health Care and Education Reconciliation Act* (May 2010) (This summary is presented in a small font and is 159 pages long).

2. Congress may not invade a patient's privacy

The individual mandate is an assault on the confidentiality of the physician-patient relationship.[19] For more than two millennia, physicians and patients have understood that a patient receives better care if the patient candidly discloses private information, *e.g.* medical history, symptoms, and treatments, to the physician. U.S. Congress, Office of Technology Assessment, *Protecting Privacy in Computerized Medical Information*, OTA-TCT-576 (pages 5-6, 26-30) (U.S. G.P.O., Sept. 1993). To mandate the purchase of medical insurance and then to require disclosure of that insurance is tantamount to providing the government, as well as entities it outsources to, with a roadmap to patients' medical information. Under the Constitution, a patient has a right to a "private enclave" where his or her medical care and information is private. The individual mandate obliterates that enclave.

In *Westinghouse*, the Third Circuit eloquently applied the "private enclave" principle to a case involving confidentiality of medical information.

> There can be no question that an employee's medical records, which may contain intimate facts of a personal nature, are well within the ambit of materials entitled to privacy protection. Information about one's body and state of health is matter which the individual is ordinarily entitled to retain within the "private enclave where he may lead a private life."

---

[19] This assault is compounded by Section 1502's compelled disclosure of coverage.

638 F.2d at 577 *quoting United States v. Grunewald*, 233 F.2d 556, 581-82 (2d Cir 1956) (Frank, J., dissenting), *rev'd* 353 U.S. 931 (1957). In *Grunewald*, Judge Frank said:

> That right is the hallmark of our democracy. The totalitarian regimes scornfully reject that right. They regard privacy as an offense against the state. Their goal is utter depersonalization. They seek to convert all that is private into the totally public, to wipe out all unique "private worlds," leaving a "public world" only, a la Orwell's terrifying book, "1984." They boast of the resultant greater efficiency in obtaining all the evidence in criminal prosecutions. We should know by now that their vaunted efficiency too often yields, unjust, cruel decisions, based upon unreliable evidence procured at the sacrifice of privacy. We should be aware of moving in the direction of totalitarian methods, as we will do if we eviscerate any of the constitutional privileges.

Grunewald, 233 F.2d at 582. Previously, Judge Frank described the right to a "private enclave" in *United States v. On Lee*, 193 F.2d 306, 315-16 (2d Cir. 1951) (Frank, J., dissenting), *aff'd*, 343 U.S. 747 (1952).

> "A man can still control a small part of his environment, his house; he can retreat thence from outsiders, secure in the knowledge that they cannot get at him without disobeying the Constitution. That is still a sizable hunk of liberty – worth protecting from encroachment. A sane, decent, civilized society must provide some oasis, some shelter from public scrutiny, some

> insulated enclosure, some enclave, some inviolate place which is a man's castle."

On Lee, 193 F.2d at 315-16.[20]

The right to a "private enclave" underlies Fourth and Fifth Amendment jurisprudence. *Miranda*, 384 U.S. at 460; *Murphy v. Waterfront Commission of New York Harbor*, 378 U.S. 52, 55 (1964) (privilege against self-incrimination); *Tehan v. United States ex rel. Shott*, 382 U.S. 406, 415-16 (1966) (both the Fourth and Fifth Amendments involve the "right of the individual to be let alone"); *O'Connor v. Ortega*, 480 U.S. 709, 717 (1987) (Fourth Amendment rights of public employees).

In *Miranda*, the Court showed a concern regarding creeping encroachments on individual liberties and also quoted *Grunewald* at a crucial point in its analysis.

> Those who framed the Constitution and the Bill of Rights were aware of subtle encroachments on individual liberty. They knew that "illegitimate and unconstitutional practices get their first footing . . . by silent approaches and slight deviations from legal modes of procedure. . . The privilege was elevated to constitutional status and has always been "as broad as the mischief against which it seeks to guard . . ."
>
> Thus we may view the historical development of the privilege [against self-incrimination] as one which groped for the proper scope of governmental power over the citizen. As a "noble principle often transcends its origins," the privi-

---

[20] This passage was quoted in *Silverman v. United States*, 365 U.S. 505, 511-12 n.4 (1961).

> lege has come rightfully to be recognized in part as an individual's substantive right, a "**right to a private enclave where he may lead a private life. That right is the hallmark of our democracy**." [*Grunewald*, 233 F.2d at 579, 581-582]. We have recently noted that the privilege against self-incrimination – the essential mainstay of our adversary system – is founded on a complex of values . . . All these policies point to one overriding thought: the constitutional foundation underlying the privilege is the respect a government – state or federal – must accord to the dignity and integrity of its citizens.

Miranda, 384 U.S. at 459-60 (emphasis added) (citations omitted).

To protect personal medical information, the most private of private enclaves, an individual must be allowed to pay for medical care directly and not be required to purchase health insurance. Typically, at the moment a health insurance carrier enrolls an individual, it requires that individual to disclose his or her complete medical history. *See e.g.*, Empire BlueCross/BlueShield Form ENR02968 (Rev 1/11) at 5. Furthermore, as an insurance carrier pays claims to physicians, hospitals, pharmacies, *etc.*, on an individual's health insurance policy, the carrier amasses more of that individual's private medical information. By forcing individuals to purchase medical insurance, ACA destroys a patient's right and ability to keep medical information private.[21]

---

[21] The risk of loss of private information is real. Today, many private insurers, federal agencies and their respective business associates outsource at least part of their operations. GAO, *PRIVACY: Domestic and Offshore Outsourcing of Personal Information in Medicare, Medicaid, and TRICARE*, Report No. 06-

To put a patient's constitutional rights in perspective, consider the victim and perpetrator of a violent crime. While *Miranda* allows a perpetrator to retreat into a "private enclave", ACA appears to prevent a victim-patient from totally remaining silent by compelling the victim-patient to disclose certain private information. The victim-patient's private enclave is thereby compromised. The victim-patient is put in a worse position than his or her attacker.

IV. ACA IS UNCONSTITUTIONAL BECAUSE SECTION 1501 IS NOT SEVERABLE

The traditional test for severability is well-known:

> "The standard for determining the severability of an unconstitutional provision is well established: Unless it is evident that the Legislature would not have enacted those provisions which are within its power, independently of that which is not, the invalid part may be dropped if what is left is fully operative as a law." *Alaska Airlines v. Brock*, 480 U.S. 678, 684 (1987) (internal quotation marks omitted). While the Act itself contains no statement of whether its provisions are severable, "[i]n the absence of a severability clause, . . . Congress' silence is just that – silence – and does not raise a presumption against severability." *Id.* at 686. . . .

New York v. U.S. 505 U.S. 144, 186 (1992). Nor, as a matter of logic and judicial consistency, should that Congressional silence raise a presumption in favor of severability.

---

676 (Sept. 2006). Therefore, a patient has little actual knowledge or control over who sees his or her confidential information.

Respondent is prevented from arguing that Section 1501 is severable if it is unconstitutional because she repeatedly admitted the individual mandate is "essential" to ACA. Defendant's Motion for Summary Judgment, *Virginia Action* Doc 91 at 1, 13-16, 25-29; Order Granting Summary Judgment, *Florida Action* Doc 150 at 63-64 ("the defendants concede that [the individual mandate] is absolutely necessary for the Act's insurance market reforms to work as intended. In fact, they refer to it as an 'essential' part of the Act at least fourteen times in their motion to dismiss"); Brief for Appellant, *Virginia Appeal*, Doc 21 at 34-39; *Clarification Order* at 6-8.

Furthermore, neither Section 1501 nor any other unconstitutional provision in ACA may be severed to save the remainder of ACA because severance is a judicial line item veto. In *Clinton*, Presidential line item vetoes were declared unconstitutional. 524 U.S. at 447-449. In *Chadha*, Congressional vetoes were declared unconstitutional. 462 U.S. at 959. Although this Court has, on occasion, severed defective provisions of federal statutes, *see e.g.*, *Alaska Airlines*, 480 U.S. 678, that remedy should be unavailable to courts in light of *Clinton and Chadha*. The Bicameral and Presentment Clauses require the House and Senate to pass precisely the same text – not a single word or punctuation may vary between the bills passed by each chamber. *Clinton*, 524 U.S. at 448. The judiciary, like the President, has no power to rewrite a statute. Furthermore, the idea that the judiciary be joined with the executive in a "council of revision" was considered and expressly rejected by the Drafters of the Constitution. Brief of Senators Robert C. Byrd, Daniel Patrick Moynihan, and Carl Levin as *Amici Curiae* in Support of

Appellees 9-10 in *Clinton v. City of New York* (Docket No. 97-1374).

In addition to violating the Constitution's letter and spirit, the practice of severing a defective provision from a statute lacking a severability clause is bad policy because: (1) it facilitates legislative sloppiness – a bill's author knows the constitutionality of its provisions will be addressed piecemeal; (2) it allows judicial activism – a court can substitute its own judgment for the legislative bargain that was struck in Congress and agreed to by the President;[22] and (3) it encourages omnibus legislation – which members of Congress may not have sufficient time to read and understand prior to casting their votes.[23]

Regardless of the deference accorded to Congress, this Court may not sever a defective provision from a statute in the absence of a severability clause because severance is a judicial line item veto. This practice substantially alters the dispersion of powers incorporated into the Constitution. It is time to return "all legislative power" to Congress as required by the Constitution's first clause. U.S. CONST. art. I, sec. 1, cl. 1.

---

[22] Congress, like other legislatures, is an institution that is conducive to vote trading and logrolling activities. To enact a law, a majority coalition must be formed. Consequently, members of Congress often cooperate to further an individual or collective agenda. Passage of a bill might require the vote of a single member of Congress or Senator. If ACA had contained a severability clause, the legislative bargain made by members of Congress probably would not have been reached. Indeed, a severability clause was included in an early version of H.R. 3590, but was excluded from ACA, as enacted.

[23] The Presentment Clause directs "reconsideration" of vetoed bills – implicitly requiring members of Congress to actually "consider" a bill.

CONCLUSION

For the foregoing reasons, *Amici* believe that Section 1501 and ACA are unconstitutional and that the Petition should be granted.

Respectfully submitted,

DAVID P. FELSHER
Counsel of Record
488 Madison Avenue
New York, NY 10022
(212) 308-8505
dflaw@earthlink.net

March 14, 2011

Attorney for Amici Curiae

Supreme Court, U.S.
FILED
FEB 24 2011
OFFICE OF THE CLERK

No. 10-1014

IN THE SUPREME COURT OF THE UNITED STATES

COMMONWEALTH OF VIRGINIA, ex rel. Kenneth T. Cuccinelli, II, in his Official Capacity as Attorney General of Virginia,
Petitioner

v.

KATHLEEN SEBELIUS, Secretary of the Department of Health and Human Services, in her Official Capacity,
Respondent

On Petition for A Writ of Certiorari Before Judgment To The United States Court of Appeals for the Fourth Circuit

Brief for Amici Curiae Liberty University, Michele Waddell and Joanne Merrill In Favor of Neither Party

Mathew D. Staver
(Counsel of Record)
Anita L. Staver
LIBERTYCOUNSEL
1055 Maitland Center Commons, 2d Floor
Maitland, FL 32751
(800) 671-1776
court@lc.org
Attorneys for Amici

Stephen M. Crampton
Mary E. McAlister
LIBERTY COUNSEL
PO Box 11108
Lynchburg, VA 24506
(434) 592-7000
court@lc.org
Attorneys for Amici

TABLE OF CONTENTS

TABLE OF AUTHORITIES ii

INTEREST OF AMICI CURIAE 1

INTRODUCTION 2

LEGAL ARGUMENT 7

I. THE CONSTITUTIONALITY OF THE ACT IS OF PROFOUND NATIONAL IMPORTANCE AND SHOULD BE DETERMINED ONLY AFTER EXAMINATION OF THE FULL ARRAY OF CONSTITUTIONAL CHALLENGES AGAINST THE ACT.. 7

II. THE GOAL OF OBTAINING PROMPT, FINAL AND CONSISTENT RESOLUTION OF MATTERS OF GREAT PUBLIC IMPORTANCE WOULD BEST BE SERVED BY CONSIDERING AMICI'S CASE ALONG WITH THE COMMONWEALTH'S CASE IF THIS COURT SHOULD GRANT EXPEDITED REVIEW. 14

CONCLUSION 16

TABLE OF AUTHORITIES

Cases

Carter v. Carter Coal Co.,
298 U.S. 238 (1936) 16

Commonwealth of Va. v. Sebelius,
728 U.S. 768 (ED Va. 2010) 3, 4, 8, 9

Florida v. Dep't of Health and Human Servs.,
2011 WL 285683 (N.D. Fla. 2011) 7. 10

Gonzales v. Raich,
545 U.S. 1 (2005) 3

Gratz v. Bollinger,
539 U.S. 244 (2003) 16

Liberty University, et. al, v. Geithner, et. al.,
2010 WL 4860299 (W.D. Va 2010) ... 1, 2, 3, 13

Porter v. Dicken,
328 U.S. 252 (1946) 16

Thomas More Law Center v. Obama,
720 F.Supp.2d 882 (ED Mich. 2010) 7, 9

United States v. Nixon,
418 U.S. 683 (1974) 14, 15

United States v. Ohio Power Co.,
353 U.S. 98 (1957) 15, 16

Wickard v. Filburn,
317 U.S. 111 (1942) 3

Statutes

Patient Protection and Affordable Care Act of 2009 Pub. L. No. 111-148, 124 Stat. 119 (Mar. 23, 2010) 1, 2

Religious Freedom Restoration Act,
42 U.S.C. §§ 2000bb-1(a)-(b) 3

Other Authorities

Congressional Budget Office Memorandum, *The Budgetary Treatment of an Individual Mandate to Buy Health Insurance*, August 1994. 11

Jennifer Staman & Cynthia Brougher, Congressional Research Service, *Requiring Individuals to Obtain Health Insurance: A Constitutional Analysis*, July 2009 11-13

United States Court of Appeals Judicial Caseload Profile,
http://www.uscourts.gov.cgi-bin/cmsa2010Jun 6

INTEREST OF AMICI CURIAE[1]

Amici Liberty University, Michele Waddell and Joanne Merrill are plaintiffs in *Liberty University, et. al, v. Geithner, et. al.*, 2010 WL 4860299 (W.D. Va 2010) ("*L.U. v. Geithner*"), which, like Petitioner's case, is a challenge to portions of the Patient Protection and Affordable Care Act of 2009 Pub. L. No. 111-148, 124 Stat. 119 (Mar. 23, 2010) (the "Act"). Amici's case. like Petitioner's, is on appeal at the Fourth Circuit Court of Appeals, Case No. 10-2347, and is set for oral argument on the same day before the same panel during the week of May 10, 2011 as is Petitioner's case.

Amici have raised Commerce Clause and Necessary and Proper Clause challenges to the individual insurance mandate, Section 1501 of

---

[1] No counsel for a party authored this brief in whole or in part, and no such counsel or party made a monetary contribution intended to fund the preparation or submission of this brief. No person or entity other than the *amici curiae* made a monetary contribution intended to fund its preparation or submission. The parties have consented to the filing of this Amicus Brief, and such consents are being filed with the Court simultaneously with the filing of this Brief. Notice has been given to the parties.

the Act, as has Petitioner. However, Amici have also challenged the employer insurance mandate, Section 1513 of the Act, and have raised First Amendment, Fifth Amendment and statutory challenges to both mandates. Amici's more personal and extensive interests in the repercussions arising from the Mandates provide additional information and viewpoints that should be considered when determining whether expedited review should be granted. Amici's interests will be significantly affected by this Court's decision, particularly in light of the concurrent oral argument schedule set before the Fourth Circuit.

Amici respectfully submit this Amicus Curiae Brief to provide this Court with information and arguments to aid its consideration of this Petition.

INTRODUCTION

On the day that President Obama signed the Act into law, Amici filed their complaint in the Western District of Virginia. *L.U. v. Geithner*, 2010 WL 4860299 at *1. Amici sought declaratory and injunctive relief on the grounds that the Act, and, in particular, the Individual and Employer Mandates, exceeded Congress' enumerated powers under the Commerce Clause and Necessary and Proper Clause. *Id.* Amici also alleged that the Mandates violate

their rights to free speech, association and free exercise under the First Amendment, violate the Establishment Clause of the First Amendment, violate the Equal Protection Clause of the Fifth Amendment, violate the prohibition against unallocated direct or capitation taxes, violate the Guarantee Clause and violate the Religious Freedom Restoration Act ("RFRA"), 42 U.S.C. §§ 2000bb-1(a)-(b). *Id.* at *2.

On November 30, 2010, the District Court granted the Administration's Rule 12(b)(6) motion to dismiss all causes of action. *Id.* at *49. The court ruled that the Individual and Employer Mandates are valid exercises of Congress' Commerce Clause powers under this Court's decisions in *Wickard v. Filburn*, 317 U.S. 111, 63 S.Ct. 82, 87 L.Ed. 122 (1942) and *Gonzales v. Raich*, 545 U.S. 1, 16-17, 125 S.Ct. 2195, 162 L.Ed.2d 1 (2005) and found that the other claims lacked merit.

Two weeks later, Judge Hudson of the Eastern District of Virginia reached the opposite conclusion, finding that *Wickard* and *Gonzales* did not support Congress' attempted expansion of its Commerce Clause authority. *Commonwealth of Va. v. Sebelius*, 728 U.S. 768, 780 (ED Va. 2010).

> In *Wickard* and *Gonzales*, the Supreme Court staked out the outer boundaries of Commerce Clause power. In both cases, the activity under review was the product of a self-directed affirmative move to cultivate and consume wheat or marijuana. This self-initialed change of position voluntarily placed the subject within the stream of commerce. Absent that step, governmental regulation could have been avoided.

Id. No such step is taken when individuals do not purchase health insurance, so *Wickard* and *Gonzales* do not support the mandate. *Id.* In fact, "this broad definition of the economic activity subject to congressional regulation lacks logical limitation and is unsupported by Commerce Clause jurisprudence." *Id.* at 781.

Judge Hudson's ruling created an intra-circuit conflict regarding the constitutionality of the Individual Mandate that is now in the hands of the Fourth Circuit. However, since Amici's case also challenges the Employer Mandate and Amici also alleged that the Mandates violate their rights to free speech, association and free exercise under the First Amendment, violate the Establishment Clause

of the First Amendment, violate the Equal Protection Clause of the Fifth Amendment, violate the prohibition against unallocated direct or capitation taxes, violate the Guarantee Clause and violate RFRA, it poses additional questions for appellate review.

Both cases are set for oral argument, seriatim, before the same Fourth Circuit panel on the same day during the oral argument sitting the week of May 10, 2011. (Case 10-2347 Doc. 24, Case 11-1057, Doc. 24). That will place the cases on the same timing track for possible review by this Court. Simultaneous consideration of both cases would serve the interests of efficient and comprehensive resolution of the issues of great national interest that have been raised by Petitioner and Amici. Taking Petitioner's case off of that track without also taking Amici's would create the possibility of conflicting, inconsistent rulings and duplicative determination by this Court. Amici are not taking a position on whether expedited review is necessary under these circumstances, but that if such review is granted, Amici believe that their case should also be included in the expedited review and be argued separately from Petitioner's.

As of June 30, 2010, the Fourth Circuit was ranked first among the circuit courts for

the shortest median time between the filing of the notice of appeal and final disposition of a case. (United States Court of Appeals Judicial Caseload Profile, available at http://www.uscourts.gov.cgi-bin/cmsa2010Jun (last visited February 14, 2011)). As of September 30, 2010, the Fourth Circuit was ranked second, with a median time of 9.1 months. (United States Court of Appeals Judicial Caseload Profile, available at http://www.uscourts.gov.cgi-in/cmsa2010Sep.p1 (last visited February 14, 2011)). If the court follows that trend with these cases and takes no longer than the median time for resolution, then a ruling could be anticipated on or about September 1, 2011(nine months after Amici's notice of appeal dated December 1, 2010). That would mean that both cases could be considered by this Court during its October term. In light of the intervening summer recess and usual time frame for briefing and oral argument, Amici believe that by-passing the Fourth Circuit would save five to six months.

Amici's case and Petitioner's case are related, but all of the constitutional challenges to the Act cannot be fully resolved unless both cases are considered. Therefore, Amici respectfully request that, should the Court agree to grant the petition and expedite review,

then Amici's case should also be included in the review.

LEGAL ARGUMENT

I. THE CONSTITUTIONALITY OF THE ACT IS OF PROFOUND NATIONAL IMPORTANCE AND SHOULD BE DETERMINED ONLY AFTER EXAMINATION OF THE FULL ARRAY OF CONSTITUTIONAL CHALLENGES AGAINST THE ACT.

What is at stake in this case is not merely whether portions of the Act are constitutional, but how far Congress can intrude into the private lives of citizens without exceeding their limited authority under Article I, §8 of the Constitution. Petitioner, Amici and others challenging the Act have addressed that concept in the context of the Individual Mandate,[2] but Amici have gone farther. Amici question not only how far Congress can intrude into private individuals' rights under the Commerce Clause, but also how far Congress

---

[2] *See also, Thomas More Law Center v. Obama*, 720 F.Supp.2d 882, 893 (ED Mich. 2010), Sixth Circuit Court of Appeals Case No. 10-2388; *Florida v. Dep't of Health and Human Servs.*, 2011 WL 285683 (N.D. Fla. 2011).

can intrude into employers' rights under the Commerce Clause, and whether the mandates violate their rights to free speech, association and free exercise under the First Amendment, violate the Establishment Clause of the First Amendment, violate the Equal Protection Clause of the Fifth Amendment, violate the prohibition against unallocated direct or capitation taxes, violate the Guarantee Clause and violate RFRA.

As Judge Hudson said in his opinion granting Petitioner's Motion for Summary Judgment, the Individual Mandate "appears to forge new ground and extends the Commerce Clause powers beyond its current high water mark." *Commonwealth of Va. v. Sebelius*, 728 U.S. at 775.

> While this case raises a host of complex constitutional issues, all seem to distill to the single question of whether or not Congress has the power to regulate–and tax–a citizen's decision not to participate in interstate commerce. Neither the U.S. Supreme Court nor any circuit court of appeals has squarely addressed this issue. No reported case from any federal appellate

> court has extended the Commerce Clause or Tax Clause to include the regulation of a person's decision not to purchase a product, notwithstanding its effect on interstate commerce.

Id. at 771.

Judge Steeh of the Eastern District of Michigan similarly observed that the question of whether Congress has the authority to enact the Individual Mandate "arguably presents an issue of first impression." *Thomas More Law Center v. Obama,* 720 F.Supp.2d 882, 893 (ED Mich. 2010).

> The Supreme Court has always required an economic or commercial component in order to uphold an act under the Commerce Clause. The Court has never needed to address the activity/inactivity distinction advanced by plaintiffs because in every Commerce Clause case presented thus far, there has been some sort of activity.

Id. Judge Vinson of the Northern District of Florida agreed with Judge Steeh that Congress is seeking to expand its constitutional authority

by enacting the Individual Mandate, but disagreed with him about whether Congress' actions are valid. *Florida v. Dep't of Health and Human Servs.*, 2011 WL 285683 (N.D. Fla. 2011). This Court has never addressed the activity/inactivity distinction "because, until now, Congress had never attempted to exercise its Commerce Clause power in such a way before." *Id.* at *21.

> It would be a radical departure from existing case law to hold that Congress can regulate inactivity under the Commerce Clause. If it has the power to compel an otherwise passive individual into a commercial transaction with a third party merely by asserting–as was done in the Act–that compelling the actual transaction is *itself* "commercial and economic in nature, and substantially affects interstate commerce" [*see* Act § 1501(a)(1)], it is not hyperbolizing to suggest that Congress could do almost anything it wanted.

Id. at *22 (emphasis in original).

Indeed, well before it passed the Act and its mandates, Congress was alerted that it was seeking an unprecedented expansion of its

Commerce Clause authority. As far back as 1994, Congress was told that "the imposition of an individual mandate, or a combination of an individual and employer mandate would be an unprecedented form of federal action."[3] More recently, but still eight months before the Act was adopted, the Congressional Research Service told Congress that it was not clear whether a mandate could be valid under the Commerce Clause.[4] "Despite the breadth of powers that have been exercised under the Commerce Clause, it is unclear whether the clause would provide a solid constitutional foundation for legislation containing a requirement to have health insurance."[5] "Whether such a requirement would be constitutional under the Commerce Clause is perhaps the most challenging question posed by such a proposal, as it is a novel issue whether

---

[3] Congressional Budget Office Memorandum, *The Budgetary Treatment of an Individual Mandate to Buy Health Insurance*, at 1, August 1994.

[4] Jennifer Staman & Cynthia Brougher, Congressional Research Service, *Requiring Individuals to Obtain Health Insurance: A Constitutional Analysis*, at 3 July 2009.

[5] *Id.*

Congress may use this clause to require an individual to buy a good or service."[6]

As these sources attest, the question of whether Congress can impose individual or employer health insurance mandates cuts to the core of the Constitution's concept of enumerated powers. The varying conclusions of the courts reviewing the question point to the significance of determining how far this Court's Commerce Clause precedents can be expanded by Congress. Petitioner's case and the other cases decided in Michigan and Florida have addressed that question in terms of the Individual Mandate, but not as to the Employer Mandate. Amici's case is the only one that has addressed the question of whether Commerce Clause precedents addressing the terms and conditions of employment can be expanded to include mandating that employers offer health insurance.

In addition, Amici's case is the only case which addresses the other constitutional rights affected by the Act, rights which were described in the Congressional Research Service's analysis. The analysts noted that insurance mandates could raise questions about invasion of privacy or similar fundamental rights, which

---

[6] *Id.*

could trigger due process and/or equal protection claims under the Fifth Amendment.[7] They also observed that requiring that individuals purchase health insurance might conflict with certain parties' religious beliefs, which would trigger free exercise and/or Establishment Clause claims.[8] The analysts also noted that religious exemptions from insurance mandates could raise Establishment Clause questions regarding preferring or burdening particular religious beliefs.[9] The report further noted that a mandate and religious exemptions could also create free exercise issues under RFRA.[10]

Amici have raised precisely those claims and thereby widened the scope of constitutional review of the Act beyond the enumerated powers claims raised by Petitioner and others. *L.U. v. Geithner*, 2010 WL 4860299 at *2. Those additional claims should be included in any review of the Act in order to ensure that there can be a consistent and determinative resolution regarding whether the Act is constitutionally valid. Consequently, if this Court should agree to accept and expedite

---

7 *Id.* at 9-12.

8 *Id.* at 13-17.

9 *Id.*

10 *Id.*

review of the Act, it should include Amici's case in its order.

II. THE GOAL OF OBTAINING PROMPT, FINAL AND CONSISTENT RESOLUTION OF MATTERS OF GREAT PUBLIC IMPORTANCE WOULD BEST BE SERVED BY CONSIDERING AMICI'S CASE ALONG WITH THE COMMONWEALTH'S CASE IF THIS COURT SHOULD GRANT EXPEDITED REVIEW.

In the limited instances when this Court has granted expedited review under Rule 11, it has done so in order to resolve matters of great public importance that touch on questions of constitutional interpretation and present conflicts between courts and/or between branches of the government. *See e.g., United States v. Nixon*, 418 U.S. 683, 686-687 (1974) (granting both parties' petitions for certiorari before judgment on the question of whether executive privilege can be used to avoid responding to a congressional subpoena). This Court has found that such circumstances warrant by-passing intermediate appellate review in the interest of obtaining a prompt resolution. *Id.* Petitioner asserts that its case presents these concerns in the form of the

conflicts between the Individual Mandate and this Court's Commerce Clause jurisprudence and between the mandate and a state law that prohibits compelling Virginia citizens to purchase health insurance. (Petition for Certiorari before Judgment at 4-5). Amici's case brings the conflict between the Individual Mandate and the Commerce Clause into even sharper focus by illustrating the intra-circuit conflict created by the contradictory rulings between Judge Moon in the Western District and Judge Hudson in the Eastern District of Virginia. Amici's case also provides evidence of additional conflicts between the Employer Mandate and the Commerce Clause and between the mandates and individual and employer rights under the First and Fifth amendments and RFRA.

Reviewing Amici's case in concert with Petitioner's case would enable this Court to comprehensively review the full array of legal challenges and promote judicial efficiency by avoiding piecemeal review. *See id.* at 690 (discussing Congress' strong policy against piecemeal reviews). It would also further the Court's interests in disposing of cases addressing similar issues in a consistent fashion and having uniform application of principles set forth in its decisions. *United States v. Ohio Power Co.*, 353 U.S. 98, 98-99

(1957) (per curiam). This Court has frequently brought together multiple comparable cases to further those interests. *See e.g., Gratz v. Bollinger*, 539 U.S. 244 (2003) (granting certiorari before judgment in order to simultaneously consider two cases addressing admissions policies at the University of Michigan); *Porter v. Dicken*, 328 U.S. 252 (1946) (granting certiorari before judgment to consider two cases dealing with rent control issues); *Carter v. Carter Coal Co.*, 298 U.S. 238 (1936) (considering multiple cases dealing with wage and price controls on coal mines). The constitutional challenges to the Act present a similar situation, and this Court should similarly agree to hear Amici's case simultaneously with Petitioner's case if the Court should grant Petitioner's request.

CONCLUSION

The public importance of the challenges to the Act and the potential for piecemeal, inconsistent rulings if only one of the challenges is heard in an expedited manner points to the need to have Amici's case heard at the same time as Petitioner's case if this Court should grant Petitioner's request.

Amici respectfully request that this Court adopt Petitioner's recommendation that, should

it grant expedited review of Petitioner's case, it should also bring Amici's case and the other pending cases up for review at the same time.

February, 2011.

Mathew D. Staver
(Counsel of Record)
Anita L. Staver
LIBERTY COUNSEL
1055 Maitland Center Commons, 2d Flr.
Maitland, FL 32751
(800) 671-1776
Email: court@lc.org
Attorneys for Amici

Stephen M. Crampton
Mary E. McAlister
LIBERTY COUNSEL
PO Box 11108
Lynchburg, VA 24506
(434) 592-7000
Email: court@lc.org
Attorneys for Amici

183 No. 10-1014 (4)

Supreme Court, U.S.
FILED
MAR 14 2011
OFFICE OF THE CLERK

In The Supreme Court of the United States

COMMONWEALTH OF VIRGINIA,
EX REL. KENNETH T. CUCCINELLI, II, IN HIS
OFFICIAL CAPACITY AS ATTORNEY GENERAL OF VIRGINIA,
Petitioner,

v.

KATHLEEN SEBELIUS,
SECRETARY OF THE DEPARTMENT OF HEALTH AND
HUMAN SERVICES, IN HER OFFICIAL CAPACITY,
Respondent.

On Petition for a Writ of Certiorari
Before Judgment to the United States
Court of Appeals for the Fourth Circuit

Brief Amicus Curiae of Physician Hospitals of America in Support of the Commonwealth of Virginia On Petition for Writ of Certiorari Before Judgment

Robert L. Hodges
Counsel of Record
Scott C. Oostdyk
H. Carter Redd
Lisa M. Sharp
Matthew D. Fender
MCGUIREWOODS LLP
One James Center
901 East Cary Street
Richmond, Virginia 23219
(804) 775-1000

Counsel for Physician Hospitals of America

LANTAGNE LEGAL PRINTING
801 East Main Street Suite 100 Richmond, Virginia 23219 (800) 847-0477

TABLE OF CONTENTS

INTEREST OF THE AMICUS 1

SUMMARY OF THE ARGUMENT 4

REASONS WHY A WRIT SHOULD BE GRANTED 6

I. The Constitutionality of § 1501 is a Question of Imperative Public Importance 6

II. Because § 1501 is Unconstitutional, the Court will Ultimately Need to Decide This Case in Any Event 11

A. Section 1501 is Ultra Vires Under the Commerce Clause 12

B. Section 1501 is Not a Valid Exercise of the Taxing Power 15

C. Section 1501 is Not Severable and the PPACA is Invalid in its Entirety 17

CONCLUSION 19

TABLE OF AUTHORITIES

Pages

Cases

Alaska Airlines v. Brock, 480 U.S. 678 (1987) 18

Ayotte v. Planned Parenthood, 546 U.S. 320 (2006) ..18

Danforth v. Minnesota, 552 U.S. 264 (2008) 6

Florida v. United States HHS,
716 F. Supp. 2d 1120 (N.D. Fla. 2010) 6

Florida v. U. S. Dept. of Health and Human Svcs.,
No. 3:10-cv-91, 2011 U.S. Dist. LEXIS 8822 (N.D. Fl. Jan. 31, 2011) 19

Florida v. United States HHS,
No. 3:10-cv-91, 2011 U.S. Dist. LEXIS 22464 (N.D. Fla. Mar. 3, 2011).....8, 11

Free Enter. Fund v. Pub. Co. Accounting Oversight Bd., 130 S. Ct. 3138 (2010) 18

Gonzalez v. Raich, 545 U.S. 1 (2005).....13

Heart of Atlanta Motel v. United States,
379 U.S. 241 (1964).....13

Katzenbach v. McClung, 379 U.S. 294 (1964).....13

Marbury v. Madison, 5 U.S. (1 Cranch)
137 (1803) 7, 13

Nat'l Endowment for the Arts v. Finley,
524 U.S. 569 (1998).....6

TABLE OF AUTHORITIES
(continued)

Page

NLRB v. Jones & Laughlin Steel Corp., 301 U.S. 1 (1937) 13

Physician Hospitals of America, et al. v. Sebelius, No. 6:10-cv-00277-MHS (E.D. Tx.) 2

Rodriguez de Quijas v. Shearson/American Express, Inc., 490 U.S. 477 (1989) 7

Sozinsky v. United States, 300 U.S. 506 (1937) ... 15, 16

State Oil Co. v. Khan, 118 S. Ct. 275 (1997) 7

United States v. Comstock, 130 S. Ct. 1949 (2010) 14

United States v. Lopez, 514 U.S. 549 (1995) 13

United States v. Morrison, 529 U.S.598 (2000) 13

Virginia v. Sebelius, 702 F. Supp. 2d 598 (E.D. Va. 2010) 6, 15

Virginia v. Sebelius, 728 F. Supp. 2d. 768,790 (E.D. Va. 2010) 4, 18

Wickard v. Filburn, 317 U.S. 111 (1942) 13

STATUTES

Patient Protection and Affordable Care Act ("PPACA"), Pub L. No. 11-148, 124 Stat. 119 (2010) ..... *passim*

TABLE OF AUTHORITIES
(continued)

Page

OTHER AUTHORITIES

H.R. 3962, 111th Cong. (2009).....16

Alaska Governor Refuses to Enact Health-Care Law, WSJ.com, http://online.wsj.com/article/SB10001424052748704657704576150730638265932.html.....10

Letter from Governors to President Obama, Feb. 9, 2011, available at http://www.heartland.org/custom/semod_policybot/pdf/29327.pdf.....10

Physician Hospitals of America ("PHA"), by and through the undersigned counsel, by consent of the parties, submits its brief amicus curiae respectfully praying that the Court grant the Petitioner a writ of certiorari.[1] In support of the petition, PHA states as follows:

Interest of the Amicus

Physician Hospitals of America ("PHA") is a 26 U.S.C. § 501(c)(6) organization formed to educate members of the physician-owned hospital community about regulatory and legislative issues and to encourage PHA members to advocate for the rights of physician-owned hospitals. PHA has approximately 166 member hospitals in 34 different states, comprising both existing facilities and physician-owned hospitals in various stages of development. PHA member hospitals are typically enrolled as providers under Medicare and Medicaid programs, with up to 70% of their case mix stemming from Medicare and Medicaid patients. The physician owners of PHA member hospitals are

---

[1] Pursuant to Sup. Ct. R. 37.6, PHA certifies that no counsel for either party authored any part of this brief and that no person, other than the amicus and its counsel, made a monetary contribution intended to fund the preparation of the brief. PHA certifies consistent with Sup. Ct. R. 37.2(a) that counsel of record for both parties have been notified more than ten days before filing of the amicus' intention to file the brief and have given their consent.

also providers under the Medicare and Medicaid programs.

PHA is committed to the sanctity of private property as guaranteed by the Constitution, especially in relation to the rights of physicians to own and operate hospitals and to provide patients with expert, cost-effective, and efficient health care. In *Physician Hospitals of America, et al. v. Sebelius*, Case No. 6:10-cv-00277-MHS, filed June 3, 2010, in the U.S. District Court for the Eastern District of Texas, Tyler Division, PHA, along with a member hospital, is challenging the constitutionality of § 6001 of the Patient Protection and Affordable Care Act of 2010 ("PPACA"), Pub L. No. 11-148, 124 Stat. 119 (2010), which singles out for negative treatment physician-owned hospitals from among all those owned by persons of any other profession. Section 6001 retroactively prohibits planned, approved, and commenced facility expansion at approximately 58 Medicare-certified hospitals solely because they are owned by physicians, and further prevents the development of an additional 84 physician-owned hospitals that would be otherwise eligible for Medicare certification.

PHA has an interest in protecting its members directly, and the public indirectly, from any unconstitutional healthcare legislation, and thus it has an interest in supporting the Commonwealth of Virginia in this action.

PHA's members have a compelling interest in seeing the Court grant a writ—each day this litigation continues its membership is further

harmed. Members who wish to build or expand hospitals are prevented from doing so. PHA's members are American citizens who wish to invest their personal capital to expand their businesses, create jobs, and serve the public. They are prevented from doing so by the specter of an ultra vires act of Congress.

Summary of the Argument

In the case below, the Commonwealth of Virginia, by its Attorney General Kenneth T. Cuccinelli, II, sued the Secretary of the Department of Health and Human Services in her official capacity, seeking to preclude her from enforcing PPACA. The U.S. District Court for the Eastern District of Virginia entered summary judgment for the Commonwealth, finding that § 1501 of PPACA was unconstitutional. However, the court did not void PPACA in its entirety, holding instead that only § 1501 and "directly-dependent provisions which make specific reference to Section 1501," were stricken. *Virginia v. Sebelius*, 728 F. Supp. 2d. 768,790 (E.D. Va. 2010). The Secretary has appealed the district court's ruling that § 1501 is unconstitutional to the U.S. Court of Appeals for the Fourth Circuit. The Commonwealth has cross-appealed on the issues of severability, scope of severability, and remedy, asking the Fourth Circuit to strike PPACA completely. Both appeals raise important questions worthy of this Court's prompt consideration on their merits.

The Court should take the unusual step of granting a writ of certiorari at this stage under Rule 11 of the Rules of the Supreme Court because the question of the Act's Constitutionality is one of imperative public importance with great economic and social consequences, having the potential to affect almost every American. The implementation necessary under PPACA is gargantuan in detail and

expense. The Secretary has admitted that striking PPACA after implementation would threaten serious harm. Yet implementation is proceeding apace, increasing the threat with each passing day.

This litigation centers on § 1501 of the Act, which requires virtually every American to purchase health insurance or pay a penalty. That provision is not within Congress' power to enact. In seeking to regulate inactivity, rather than economic activity, its purported constitutional foundation reaches far beyond this Court's Commerce Clause jurisprudence. Because this mandate to purchase health insurance is not a permissible objective under the Commerce Clause, the Necessary and Proper Clause is of no help to PPACA's defenders. Similarly, Congress' taxing power cannot justify the mandate and its associated penalty -- principally because Congress itself considered exercising that power in enacting the mandate but declined to do so. For these reasons and as set out more fully below, your amicus urges the Court to grant a writ.

Reasons Why a Writ Should be Granted

I. The Constitutionality of § 1501 is a Question of Imperative Public Importance

Both district courts that have held § 1501 unconstitutional have observed that the question of whether Congress may exercise its power to regulate Commerce to govern inactivity, in this case to purchase health insurance when one is not otherwise inclined to do so, is one of first impression. *See Virginia v. Sebelius*, 702 F. Supp. 2d 598, 612 (E.D. Va. 2010) ("As previously mentioned, the Commerce Clause aspect of this debate raises issues of national significance. The position of the parties are widely divergent and at times novel. The guiding precedent is informative, but inconclusive."); *Florida v. United States HHS*, 716 F. Supp. 2d 1120, 1163 (N.D. Fla. 2010) ("[The] case law is instructive, but ultimately inconclusive because the Commerce Clause and Necessary and Proper Clause have never been applied in such a manner before. The power that the individual mandate seeks to harness is simply without prior precedent.")

It is unquestionably the role of this Court to decide important Constitutional questions—particularly those with national import. *See, e.g.*, *Danforth v. Minnesota*, 552 U.S. 264, 291-292 (2008) (Roberts, C.J., dissenting) ("this Court is the final arbiter of federal law"); *Nat'l Endowment for the Arts v. Finley*, 524 U.S. 569, 604 (1998)("[C]ourts cannot allow a legislature's conclusory belief in

constitutionality, however sincere, to trump incontrovertible unconstitutionality"); *Marbury v. Madison*, 5 U.S. (1 Cranch) 137, 178 (1803) ("[I]f both the law and the constitution apply to a particular case, so that the court must either decide that case conformably to the law, disregarding the constitution; or conformably to the constitution, disregarding the law; the court must determine which of these conflicting rules governs the case. This is of the very essence of judicial duty."); *see, also, State Oil Co. v. Khan*, 118 S. Ct. 275, 284 (1997); *Rodriguez de Quijas v. Shearson/American Express, Inc.*, 490 U.S. 477, 484 (U.S. 1989). This case is one of pure Constitutional construction—involving an as-applied challenge to a sweeping and novel federal statute.

The Court should take the admittedly extraordinary step of granting a writ at this stage because the Constitutionality of the individual mandate is a question of overarching national importance, and its resolution is one which will brook no delay. The Secretary has in fact conceded this point in no uncertain terms while arguing against immediate implementation of the declaratory judgment issued by the United States District Court for the Northern District of Florida. There, the Secretary submitted that implementation of that court's order, "would threaten serious harm to many Americans currently benefitting from provisions of the Affordable Care Act that are already in effect and would significantly interfere with defendants' statutory duty to implement the

Act as Congress directed." (Def's Motion to Clarify, filed in No. 3:10-cv-91 in the N.D. Fl., Feb. 17, 2011). The court there put the issue in even more stark terms:

> [B]usinesses, families, and individuals are having to expend time, money, and effort in order to comply with all of the Act's requirements. Further, I do not doubt that --- assuming that my ruling is eventually affirmed --- the plaintiffs will sustain injury if the Act continues to be implemented. Reversing what is presently in effect (and what will be put into effect in the future) may prove enormously difficult. Indeed, one could argue that was the entire point in front-loading certain of the Act's provisions in the first place. **It could also be argued that the Executive Branch seeks to continue the implementation, in part, for the very reason that the implemented provisions will be hard to undo once they are fully in place.**

(Order on Def's Motion to Clarify, March 3, 2011 No. 3:10-cv-91, N.D. Fl., slip opinion p. 17) (emphasis added) (treating the defendants' motion as a motion for a stay and granting the stay conditioned on the defendants seeking expedited appellate review within seven calendar days). The Secretary may receive an unfair advantage over the Commonwealth

of Virginia if permitted to rapidly implement as much of PPACA as possible, so she can later argue that unwinding it would be too burdensome. The Court should grant a writ sooner rather than later to prevent any attempt to influence the analysis of later equitable relief.

Further, the governors of 28 states have written a public letter to the president asking the government to consent to expedited review.

> Given the daunting and costly financial and regulatory burdens that our states and the private sector will face in implementing PPACA over the coming years, particularly during this unprecedented budgetary time, public interest requires expediting a final resolution of the litigation to give certainty as soon as possible. We should not endure years of litigation in the circuit courts, when the Supreme Court can promptly provide finality. This resolution can help prevent the states and the private sector from undertaking potentially unnecessary measures and expenses. More importantly, our businesses, health care providers, and citizens of our great nation need to know as soon as possible whether all or part of the law will be upheld or stricken, so they know their options and obligations.

Letter from Governors to President Obama, Feb. 9, 2011, available at http://www.heartland.org/custom/semod_policybot/pdf/29327.pdf, last visited March 7, 2011.

In addition, at least one of the plaintiff states in the *Florida* litigation has declined to implement PPACA based on having been a prevailing party in an action challenging its constitutionality. *See* Alaska Governor Refuses to Enact Health-Care Law, WSJ.com, http://online.wsj.com/article/SB10001424052748704657704576150730638265932.html, last visited March 7, 2011. Such uncertainty is further evidence that the Court should take the extraordinary step of granting a writ at this stage of the litigation.

The important Constitutional questions raised by the enactment of PPACA and clearly at issue in this litigation may define the role of government in the coming years and bear upon important questions of life and death. Your amicus respectfully urges the Court to serve the public interest by cutting short the Secretary's dilatory tactics and promptly considering the question of whether § 1501 of PPACA is a permissible exercise of Congress' express powers and, if not, whether it is severable from the rest of PPACA. Judge Vinson's words summarize the point quite succinctly:

> [A]lmost every argument that the defendants have advanced speaks much more persuasively to why the case should be immediately appealed and pursued in

> the most expeditious and accelerated manner allowable. As both sides have repeatedly emphasized throughout this case, the Act seeks to comprehensively reform and regulate more than one-sixth of the national economy. It does so via several hundred statutory provisions and thousands of regulations that put myriad obligations and responsibilities on individuals, employers, and the states. It has generated considerable uncertainty while the Constitutionality of the Act is being litigated in the courts. *The sooner this issue is finally decided by the Supreme Court, the better off the entire nation will be.*

Florida v. United States HHS, No. 3:10-cv-91, 2011 U.S. Dist. LEXIS 22464 at *38 (N.D. Fla. Mar. 3, 2011) (emphasis added).

II. Because § 1501 is Unconstitutional, the Court will Ultimately Need to Decide This Case in Any Event

There is no basis in the Constitution for the mandate to purchase insurance found in § 1501. The Secretary cannot prevail on the merits, and awaiting Fourth Circuit review needlessly consumes judicial resources at a time when a speedy decision is imperative.

A. Section 1501 is Ultra Vires Under the Commerce Clause

Section 1501 is unconstitutional because it purports to exact a financial penalty against individual Americans who choose not to purchase health insurance. It is of course tautological that in our federal system, Congress may enact legislation only pursuant to its enumerated powers. An act of Congress which exceeds the scope of these powers is a nullity.

> The powers of the legislature are defined, and limited; and that those limits may not be mistaken, or forgotten, the constitution is written. To what purpose are powers limited, and to what purpose is that limitation committed to writing, if these limits may, at any time, be passed by those intended to be restrained? The distinction, between a government with limited and unlimited powers, is abolished, if those limits do not confine the persons on whom they are imposed, and if acts prohibited and acts allowed, are of equal obligation. It is a proposition too plain to be contested, that the constitution controls any legislative act repugnant to it; or, that the legislature may alter the constitution by an ordinary act.

Marbury v. Madison, 5 U.S. (1 Cranch) 137, 176-177 (1803).

This Court's cases over the last 75 years have drastically expanded Congress' power to regulate interstate commerce. *See, e.g., NLRB v. Jones & Laughlin Steel Corp.*, 301 U.S. 1, 37 (1937); *Wickard v. Filburn*, 317 U.S. 111 (1942); *Heart of Atlanta Motel v. United States*, 379 U.S. 241 (1964); *Katzenbach v. McClung*, 379 U.S. 294 (1964); *Gonzalez v. Raich*, 545 U.S. 1 (2005). However, the Court has also been quite clear that the Commerce power has limits. *See United States v. Lopez*, 514 U.S. 549, 556-57 (1995) ("But even these modern-era precedents which have expanded congressional power under the Commerce Clause confirm that this power is subject to outer limits"). In fact, the Court has explicitly rejected, on more than one occasion, the idea that the Commerce Clause conveys plenary authority to Congress. *See Id.* at 566 ("We always have rejected readings of the Commerce Clause and the scope of federal power that would permit Congress to exercise a police power") (Thomas, J. concurring); *United States v. Morrison*, 529 U.S.598, 617 (2000) (same).

In order for § 1501 to be within Congress' powers, this Court would have to hold exactly that: that Congress is possessed of a national police power. If Congress can exercise its power under the Commerce Clause to draft a citizen into commerce so it can then regulate his participation in that commerce, then there is no principled limit to the Commerce power. If there is no distinction between

activity and inactivity, then citizens are subject to conscription for any Congressional purpose, whether that be to purchase health insurance, buy a gym membership, eat a daily regimen of health food, or purchase a General Motors automobile. Such an interpretation of the Commerce Clause would spell the end of federalism. The Tenth Amendment would be reduced to just so much vestigial language, the rest of Art. I § 8 would be rendered mere excess verbiage, and the limited national government envisioned by the framers would be fully and finally transformed into an institution with absolute power to regulate every aspect of our lives.

The Secretary has also repeatedly suggested that even if the Commerce power is limited to the regulation of economic activity (and not the inactivity of declining to purchase health insurance), § 1501 is allowable under the Necessary and Proper Clause. This argument fails, however, because under the test applied by this Court in *United States v. Comstock*, 130 S. Ct. 1949, 1957 (2010), a statute must be "reasonably adapted to the attainment of a legitimate end under the commerce power or under other powers that the Constitution grants Congress the authority to implement." The Necessary and Proper Clause is not an independent grant of authority, and thus to suggest that it saves § 1501 merely begs the question of whether that section is *otherwise* a permissible exercise of Congress' enumerated powers.

Fortunately, this Court has repeatedly affirmed that federalism is alive and well. There are

and must be limits to the national government's powers in our federal system. In service to those principles, this Court should grant Petitioners a writ and reaffirm its prior holding that the Commerce Clause may not be expanded so as to confer upon Congress a national police power. As the district court wrote: "Never before has the Commerce Clause and associated Necessary and Proper Clause been extended this far." *Virginia v. Sebelius*, 702 F. Supp. 2d. 598, 612 (2010). To preserve the structural federalism essential to our Constitution, the Court should grant a writ and settle the question as soon as possible.

B. Section 1501 is Not a Valid Exercise of the Taxing Power

The Secretary has argued in the District Court (and in other fora) that the mandate to purchase insurance is actually a tax on not purchasing insurance, and as such is a permissible exercise of Congress' power to lay and collect taxes. This argument has repeatedly failed because it has no merit.

First, Congress did not purport to pass the mandate to purchase insurance pursuant to the taxing power. This matters because this Court has given weight to what power Congress purports to exercise when it enacts legislation. In *Sozinsky v. United States*, 300 U.S. 506 (1937), for example, the Court considered whether provisions of the National Firearms Act that provided for confiscatory taxation

of certain classes of firearms were a valid exercise of the taxing power. Concluding that, on its face, the National Firearms Act appeared to be a valid tax, the Court held that it would not look behind Congress's purported exercise of the taxing power. *Id.* at 513. The import of *Sozinsky* is that courts should not lightly disregard Congress's purported motive in passing a piece of legislation. Here, § 1501 does not purport to be a tax. The Secretary cannot prevail on the theory that, even though Congress *explicitly provided* that § 1501 is an attempt to exercise the Commerce power, it is really a tax.

Second, the record evidence shows that Congress considered and *rejected* exercising its taxing power. The House of Representatives included a provision parallel to § 1501 in an earlier version of PPACA that failed to pass the Senate. *See* H.R. 3962, 111th Cong. (2009). That failed bill, however, explicitly claimed to exercise Congress's taxing power in order to compel individuals to purchase insurance:

> In the case of any individual who does not meet the requirements of subsection (d) at any time during the taxable year, there is hereby imposed a ***tax*** equal to 2.5 percent of the excess of— (1) the taxpayers modified adjusted gross income for the taxable year, over (2) the amount of gross income specified in section 6012(a)(1) with respect to the taxpayer.

Id. (emphasis added).

This language did not survive the legislative process. Instead, Congress attempted to exercise its power under the Commerce Clause—an exercise which, as shown above, must fail. The words of Chief Justice Marshall are especially helpful here:

> [S]hould Congress, under the pretext of executing its powers, pass laws for the accomplishment of objects not intrusted to the government; it would become the painful duty of this tribunal, should a case requiring such a decision come before it, to say, that such an act was not the law of the land.

Child Labor Tax Case, 259 U.S. 20, 40 (1922) (*quoting McCulloch v. Maryland*, 17 U.S. (4 Wheat) 316, 423 (1819)).

C. Section 1501 is Not Severable and the PPACA is Invalid in its Entirety

The Secretary has argued that even if § 1501 fails, the rest of PPACA should continue to operate. It is worth noting that despite its ponderous length, PPACA does not contain a severability provision.[2] Having concluded that the individual mandate is invalid, courts have been faced with the unenviable

[2] Previous versions of the Act did contain a severability provision, but the final version of the Act did not.

task of parsing a vast legislative pronouncement in an effort to assess the viability of each of its many provisions. Such a task is hardly the proper role of the judiciary. *See Ayotte v. Planned Parenthood*, 546 U.S. 320, 330 (2006) ("mindful that our constitutional mandate and institutional competence are limited, we restrain ourselves from rewriting [the statute in question] to conform it to constitutional requirements.")

The standard to be applied, should a court choose to do so, is simply stated. This Court will ask whether it is evident that the legislature would not have enacted the remaining provisions independently of that which is invalid. *Free Enter. Fund v. Pub. Co. Accounting Oversight Bd.*, 130 S. Ct. 3138, 3161-3162 (2010). Further, this Court considers whether the remaining provisions are "incapable of functioning independently." *Alaska Airlines v. Brock*, 480 U.S. 678, 684 (1987). Application of this standard here is simply not practical. PPACA's provisions are interdependent in many ways, and it is beyond the competence of the federal courts to rewrite legislation or make judgments properly made by the legislature.

Both district courts that have reached this question have declined to parse the various provisions of PPACA for severability. *See Virginia v. Sebelius*, 728 F. Supp. 2d. 768,790 (E.D. Va. 2010) ("It would be virtually impossible within the present record to determine whether Congress would have passed this bill, encompassing a wide variety of topics related and unrelated to heath care, without

Section 1501. . . Accordingly, the Court will sever only Section 1501 and directly-dependent provisions which make specific reference to Section 1501"); *Florida v. U. S. Dept. of Health and Human Svcs.*, No. 3:10-cv-91, 2011 U.S. Dist. LEXIS 8822 at *132 (N.D. Fl. Jan. 31, 2011) ("Severing the individual mandate from the Act along with the other insurance reform provisions -- and in the process reconfiguring an exceedingly lengthy and comprehensive legislative scheme -- cannot be done.").

Because § 1501 of PPACA is unconstitutional, the proper course is for the Court to strike down the entire Act.

Conclusion

For these reasons, your amicus respectfully urges the Court to grant a writ and promptly decide these important questions.

RESPECTFULLY SUBMITTED,

Robert L. Hodges
Counsel of Record
Scott C. Oostdyk
H. Carter Redd
Lisa M. Sharp
Matthew D. Fender
McGuireWoods LLP
One James Center
901 E. Cary St.
Richmond, VA 23219
(804) 775-1000